



PANORAMA  
OF THE  
WORLD'S LEGAL  
SYSTEMS

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WIGMORE





*Wm. H. Smith*

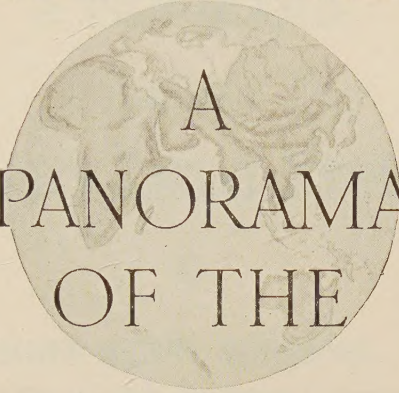
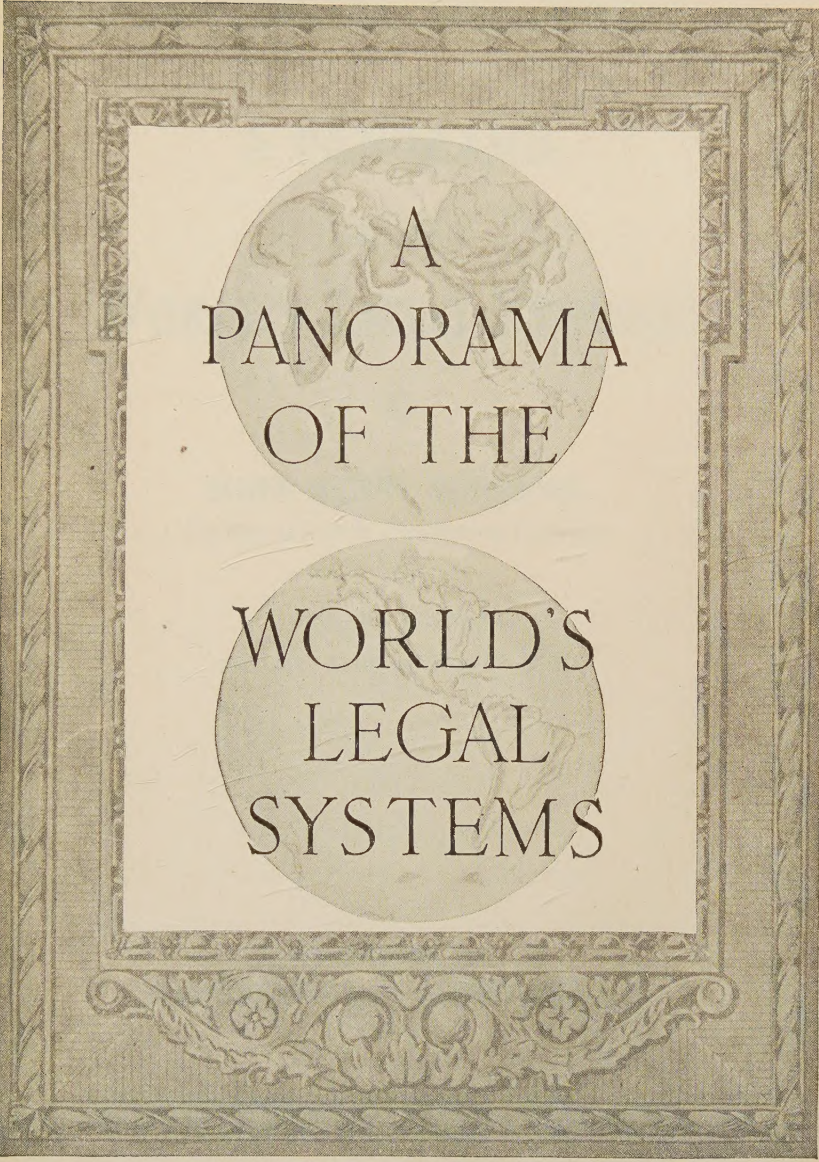




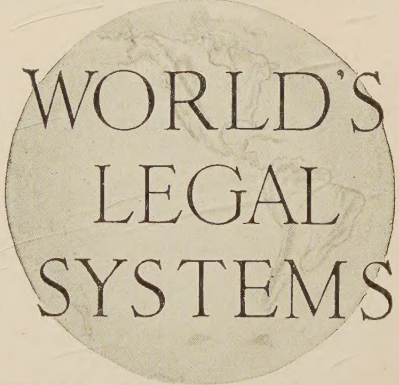




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A  
PANORAMA  
OF THE



WORLD'S  
LEGAL  
SYSTEMS







**A PANORAMA**  
*of the*  
**WORLD'S LEGAL SYSTEMS**

*by*  
**JOHN HENRY WIGMORE**  
*Professor of Law in Northwestern University*

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*To*  
THE BRETHREN OF THE BAR  
OF THE  
UNITED STATES OF AMERICA

IN THE HOPE THAT THROUGH THEIR LEADERSHIP  
THIS NATION MAY ATTAIN TO  
A LARGER KNOWLEDGE AND A DEEPER INTEREST  
IN THE  
LEGAL INSTITUTIONS OF OTHER PEOPLES  
AND  
THUS MAY BE INSPIRED  
TO A MORE READY COÖPERATION  
IN ALL THAT MAKES FOR  
THE WORLD'S LEGAL PROGRESS



## PREFACE

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Who would have thought that the dry history of Law could be made realistic with pictures? The purpose of this book is to present, in narrative and pictures (for the first time in any language), an impressionistic survey of Law and Justice in all the progressive race-stocks from ancient times to the present.

The book is meant for the information of the lay public as well as the lawyers.

The pictures serve to supply the distinctive atmosphere of each of the legal systems, and to make realistic the racial varieties of feature in the different institutions. So they include the chief codes and typical legal documents (in facsimile), the scenes where laws were enacted and justice was done, and the portraits and statues of eminent law-givers, judges, and other jurists. In short, the book offers a passing Panorama of the World's Legal Systems in Story and Picture.

The pictures have been gathered by the author, during many years past, from all over the world,—by visits to foreign countries, by search in many libraries, and by correspondence in many quarters; it is believed that no such collection has been hitherto anywhere assembled.



The narrative is based on the best attainable authorities for the various countries. It avoids any technical discussion of legal principles. It seeks by concrete examples and descriptive incidents to portray lucidly the characteristics that give individuality to each legal system; thus making the Story of Law easy to read and to understand.

In this one-volume Library Edition the text and the pictures are substantially the same (except that none are colored) as in the three-volume de luxe edition of 1928. But the text has been amplified by some paragraphs on Ethiopia, Mongolia, Nepal, and Tibet, and by the addition of several hundred citations of recent books and articles (in English) in the reading lists at the end of each chapter. And several new pictures (mostly not before published) have been added for Ethiopia, Tibet, and other countries.

May this volume contribute to a better understanding of other peoples, and thus help towards greater intelligence and mutual toleration in world-affairs!

J. H. W.

CHICAGO, MARCH 4, 1936

# A Panorama of the World's Legal Systems

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ONE PICTURE IS WORTH TEN THOUSAND  
WORDS.

*Old Chinese Proverb*

ALL HISTORIES SEPARATED FROM THEIR LIV-  
ING DOCUMENTS ARE EMPTY NARRATIVES.  
AND, SINCE THEY ARE EMPTY, THEY FALL  
SHORT OF THE TRUTH.

*Benedetto Croce*

"History, Its Theory and Practice", p. 17 (1921)

## Prologue

**I**N these days, more potently than ever, the peoples of the world find themselves drawn together towards better mutual understanding. The science of Law, too, is having its share in this grand phenomenon. But, for the wise understanding of the present, a clear knowledge of the past is necessary. Yet the past is gone from sight. Can it ever be reconstructed, so that we may understand better the spirit and the atmosphere in which disputes were settled, laws were debated, codes enacted, and justice dispensed?

If we are ever to interpret fully the cold written records of the world's legal systems, other than our own of today, must we not first seek to restore, in the mind's eye, the environment in which the several peoples lived and moved and had their being, and the setting of the distinctive events and traits in the history of their law? May we not, by pictures, give life and reality to the narrative? May we not take a temporary flight above the earth, look down upon the globe, and there watch the Panorama of the World's Legal Systems unroll before us, from the earliest past down to the present day?

Such is the purpose of the ensuing chapters.

But what were, or are, those legal systems? Not many. They can be reduced to a few, in all. That is,



## *Prologue*

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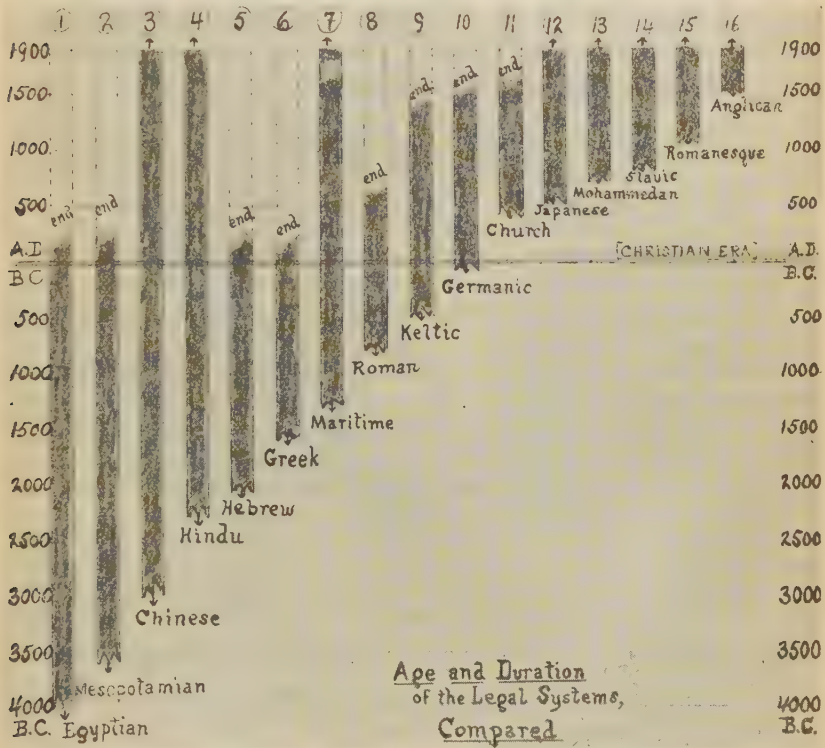
amidst the vast and changing welter of local customs, scattered rules, and casual decrees, which every tribe and people has devised for its daily life, throughout all times and places in the world's history, there emerge only a few peoples who have developed a well-defined, organized, continuous body of legal ideas and methods, reaching the dignity and solidarity of a legal system. These alone will occupy our attention.

Arranging them broadly in order of time—that is, the dates of their respective beginnings in historical times—the systems are these: Egyptian, Mesopotamian, Chinese, Hindu, Hebrew, Greek, Maritime, Roman, Keltic, Germanic, Church, Japanese, Mohammedan, Slavic, Romanesque, Anglican,—sixteen in all. By a chart one may gain a general conception of the relative age and endurance of the sixteen systems here to be described. The periods indicated on the chart for beginnings signify merely an approximate or tangible date; the beginnings were no doubt in all instances somewhat earlier.<sup>1</sup>

Some of these systems are gone; some remain. The Anglican, the Romanesque, and the Mohammedan, which are among the most youthful, today cover the greater part of the world's population. The Egyptian and the Mesopotamian, the oldest, have long disappeared. The Hindu

## Prologue

survives by tolerance under another dominant political system. Of the oldest, the Chinese alone survives in independence.



### 1. PROLOGUE: AGE AND DURATION OF THE LEGAL SYSTEMS, COMPARED

In the ensuing chapters, this sequence of the systems in their times of origin will not be strictly observed. The Hebrew system, though not so old as the Chinese, will

## Prologue

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naturally follow the Mesopotamian, in the narrative. And the story of Europe's law, since the Christian era, can best be told by describing first the Keltic, Slavic, and Germanic systems, and then turning back to the beginnings of the Maritime and Church systems, whose records far antedate those of the other three.

How shall we then, with the aid of pictures, seek to restore, to the mind's eye, the environment in which these various systems have developed during the last six thousand years?

In each one, let us recall to the eye the *edifices* in which they dispensed law and justice (whether temples, palaces, tents, courthouses, or city-gates); their principal *men of law* (whether kings, priests, legislators, judges, jurists, or advocates); and their chief types of *legal records* (whether codes, statutes, deeds, contracts, treatises, or judicial decisions). We may thus hope to reconstruct more vividly some principal impressions of their legal life, to understand more clearly their spirit, and to perceive better the contrasts between their distinctive traits and their several fates.

And first, the EGYPTIAN LEGAL SYSTEM:



THE  
EGYPTIAN  
LEGAL SYSTEM

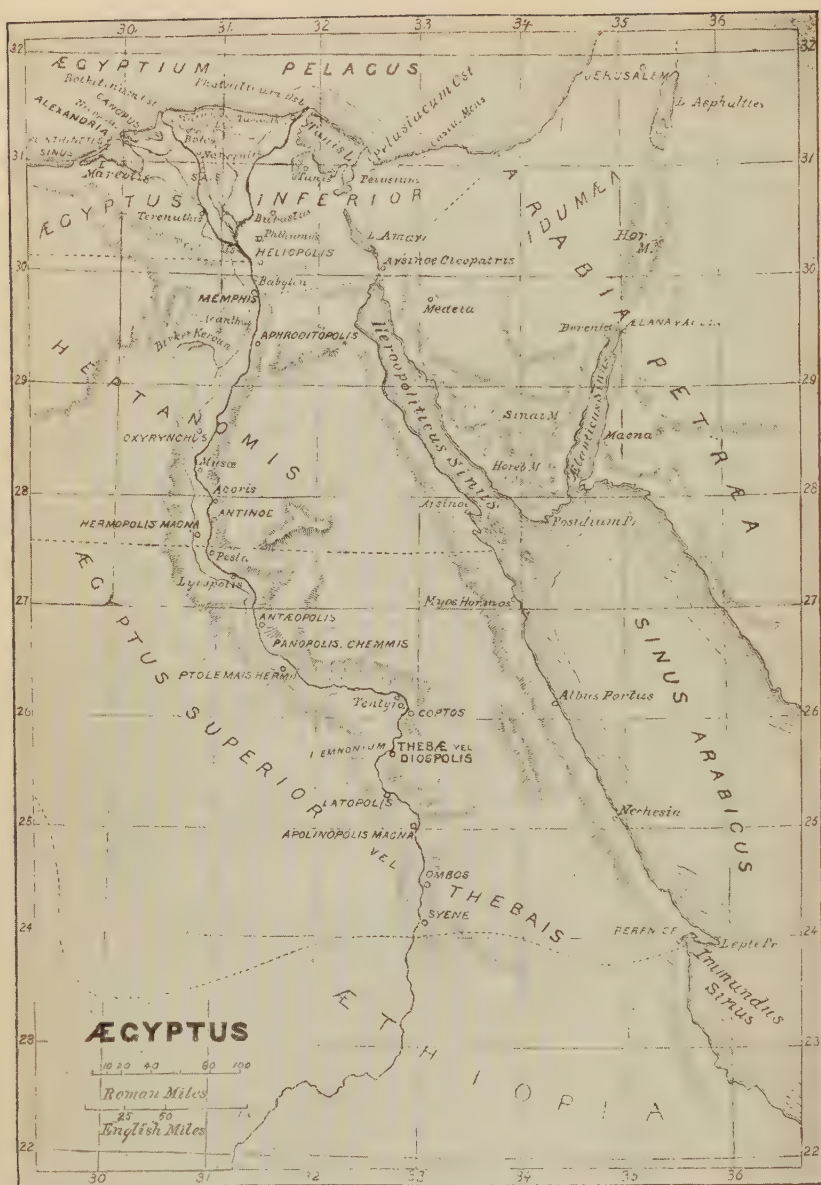




## I

### *The Egyptian Legal System*

1. Egypt and the Nile Valley—The earliest legal system.
2. The king the fountain of justice—The chief judge and prime minister—The courts.
3. Maat, the goddess of justice—Egyptian philosophy of justice—Harmhab's search for the perfect judges—Thutmose's instructions to his chief judge.
4. The king as legislator—Menes, the first law-giver—Harmhab, the legislator-king—The lost codes.
5. Transactional documents—Pictographs—Ramses II's treaty with the Hittites—Hieratic script—Uah's will—Demotic script—Bond for release of a prisoner—Marriage-contract—Greek script—Roman decision in Greek.
6. Judicial procedure—Oldest court record—Lawsuit of Mes v. Khay—Rules for procedure—Trial for treason—Trial for tomb-robbing.
7. Papyrus of Hunefer—Judgment of the Soul.
8. Egyptian system submerged under Greek and Roman and Mohammedan rule.



I. 1—MAP OF EGYPT

# I

## The Egyptian Legal System



THE true Egypt, both in earliest times and now, is nothing more than the valley of the Nile<sup>1</sup>—the bed of land which that mighty river leaves uncovered for a part of each year, and then reclaims and recovers by its beneficent inundations. In this fertile narrow valley, seven hundred miles long, a teeming population of some eight millions had early developed an elaborate civilization.

Egypt is the most productive country in the world; and in its most flourishing age is said to have contained twenty thousand cities. It deserved to be called, even more than modern Belgium, "one great town." Its location brought it into contact with all the great primitive race-stocks—alike of Africa, of Asia, and of Europe; and to all of them were transmitted some of its literary or artistic or legal ideas.

Egypt's legal system goes back, in veritable historic annals, to beyond B. C. 4000. In its later stages, it was as advanced, in its way, as the superb Egyptian architecture, which has long commanded the modern world's respect for its incredible massiveness, its engineering skill, and its decorative brilliance. The legal system of Egypt, the basis of this elaborate and luxurious civic life, persisted through many vicissitudes, under invaders

## *I. Egyptian Legal System*

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from Arabia and Mesopotamia and Persia and Greece; until finally it was supplanted in Caesar's time by the irresistible Roman system.

2. The palaces of early Egypt,<sup>2</sup> in which the king with numerous supreme judges administered justice, were the focus of government. The place of justice was the great hall, with two rows of columns, open at the end. Here were kept the records of title and boundaries, of wills and contracts. Here also all actions were filed.

During 4000 years of history, the administration of justice passed of course through many phases of fluctuation. But by the 4th Dynasty it was highly organized. At this period the title "chief judge" signified always the king's chief minister. In English history, at the Norman period, an analogous episode enables us to appreciate this union of functions; for under Henry II the Justiciar, so-called, was second only to the king, disposing of every sort of business, controlling the finances, and presiding over the king's court of justice in Westminster. In Egypt, as in all systems prior to the Roman, justice and general administration were not clearly separated. The administrative officials acted also as local judges. There were six chambers, or divisions, united as a supreme central court, presided over by the king's chief justice; and the chief justice held daily sittings in the palace, as Pharaoh's deputy.



I. 2—AUDIENCE HALL AT PHILAE

Here the king and his judges administered justice; and here were kept the records of title, of contracts, and of wills





I. 3—MAAT, GODDESS OF JUSTICE

The feather of justice, erect on the head-dress, was her emblem; and her image was worn on a gold collar by the Chief Justice

### 3. *Justice and Judges*

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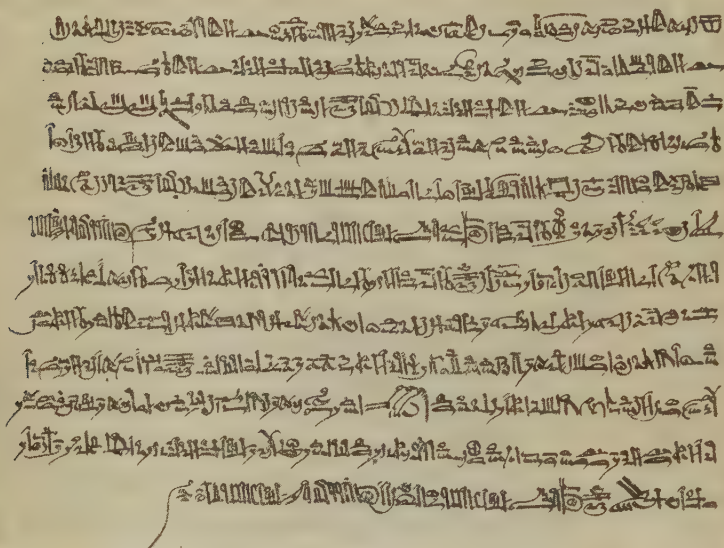
Nevertheless, the Egyptian king was constitutionally the sole supreme ruler. He ruled according to law; but he was its spokesman. By the 4th Dynasty (B.C. 2900–2750) he had become a royal theocrat, deriving divine authority from the Sun-God Osiris through his son Horus, the first pre-historic king of the Delta region. All law and all justice proceeded from the king.

3. In the Egyptian theology, Maat was the goddess of justice.<sup>3</sup> The feather of justice, erect on her head-dress, was her emblem; and her image was worn on a gold collar by the chief justice. The session began when he donned this emblem, and judgment was given by handing it to the successful litigant, in token of his success.

The word “maat” in Egypt had the basic meaning of “straight”, or “true”, and hence “just”. (So also in Greek the word “kanon” meant a “straight rule”, hence a “law”; and in Latin “rectum” meant “straight”, hence “right”; and in modern Italian “diritto” means “straight”, “right”, and “law”.) In Egypt the just and upright man was said to have “maat”; and the Egyptian kings sometimes assumed the title, “Sun of Maat” or “Justice”.

No treatises on law have yet been discovered, and it is not probable that they existed. But the Egyptian king’s philosophy of the scope of his attribute of justice may be gleaned from a passage put in the mouth of Ramses III,

## I. Egyptian Legal System



I. 4—RAMSES III's DOMESDAY BOOK

in his great survey or record of the kingdom's wealth—a sort of Domesday Book.<sup>4</sup> The papyrus containing this Domesday Book is one hundred and thirty-three feet long, the longest known; and it is called by Professor Breasted “the most sumptuous now extant.” At one paragraph in this record, the king recites his achievements as a just ruler:<sup>a</sup>

“I planted the whole land with trees and green things, and made the people to dwell in their shade. I made the land safe, so that a lone woman could go on her way freely, and none would molest her. I rescued the humble from their oppressors. I made every man safe

### 3. *Justice and Judges*

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in his home. I preserved the lives of those who sought my court of justice. The people were well content under my rule."

In the 12th dynasty, Khnem-hotep writes of King Amenemhet I:

"His majesty came that he might abolish wrong, . . . set right the abuses, and restore what one city has taken from another; allotting the water-course rights according to the recorded titles of former times, that he might do justice."

And one of the early judges, Hetep-her-khut, in the fifth dynasty, says of himself,

"I never took away anything by force from any man. I never did an act of oppression to any man. For God loveth the thing that is just."

One long edict of King Harmhab has survived; and a passage in it reveals to us, not only this king's active interest in the administration of justice, but the world-old prevalence of the problem how to find the just and competent judge. The passage reads:

[*Harmhab's Edict for Judges.*]<sup>b</sup> "I have sailed and traveled throughout the entire land. I have sought out two judges perfect in speech, excellent in character, skilled in penetrating the innermost thoughts of men, and acquainted with the procedure of the palace and the laws of the court. I have set them one in each of the two capital cities, North and South. I have furnished them with the official records and ordinances. I have instructed them in the way of justice. I have said to them, 'You shall not take money from one party and decide without hearing the other; for how could you sit as judges upon other men's deeds when one among you is himself committing an offence against justice? The penalty for such an

## I. Egyptian Legal System

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offence shall be death.' And I the king have decreed this, that the laws of Egypt may be bettered, and that suitors may not be oppressed. For I the king have in memory the acts of oppression which have been done in the land."

One of the most impressive passages in the annals of the world's justice is the speech of instructions purporting to have been pronounced by King Thutmose III (who ruled at the height of Egypt's power, about B. C. 1500) in appointing Rekhmire to the post of chief judge over the kingdom; the instructions are recorded on the tomb of Rekhmire, and here are a few of its sentences:<sup>c</sup>

[*Thutmose III's Instructions to Chief Justice Rekhmire.*] "Regulation laid upon the chief judge, Rekhmire. The officials were brought to the audience-hall; his majesty commanded that the chief judge, Rekhmire, be presented for appointment for the first time.

"His majesty spake before him: 'Take heed to thyself for the hall of the chief judge; be watchful over all that is done therein. Behold, it is a support of the whole land; behold, as for the chief judge, behold, he is not sweet, behold, bitter is he, when he speaks . . . . . Behold, he is not one setting his face toward the officials and councilors, neither one making brethren of all the people . . . . . Mayest thou see to it for thyself, to do everything after that which is in accordance with law; to do everything according to the right thereof . . . . . lo, it is the safety of an official to do things according to the law, by doing that which is spoken by the petitioner . . . . .

"It is an abomination of the god to show partiality. This is the teaching: thou shalt act alike to all, shalt regard him who is known to thee like him who is unknown to thee, and him who is near to



#### 4. *Legislation*

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. . . like him who is far . . . . . An official who does this, then shall he flourish greatly in the place.

“Do not avoid a petitioner, nor yet nod thy head when he speaks. As for him who draws near, who will approach to thee, do not . . . . . the things which he saith in speaking. Thou shalt punish him when thou hast let him hear that on account of which thou punishest him.”

4. The king, as theocrat, was also (by the time of the 4th Dynasty, B.C. 2900–2750) in name the sole legislator; though of course a skilled council advised him. To Thot (once a local god of the Delta region, and the traditional inventor of writing) was attributed the composition of the first codes; this must have been before B.C. 4240, when the calendar-reckoning begins. But the first historical human law-giver (his date is about B.C. 3400) was Menes (or, Mna); ruler at first of Upper Egypt, he later united the two regions into one kingdom, and extended Thot's laws to the whole people. His emblem was a bull, and in a hieroglyph, the most primitive form yet discovered, Menes is shown sacrificing, with his bull nearby; and the later kings of Egypt were fond of assuming the appellation “Mighty Bull.” But an astounding coincidence, still unexplained by the science of comparative law, is not only that this name of the first human law-giver, as handed down by tradition, was substantially the same in three of the oldest civilizations—Menes, in Egypt, Minos in Crete,

## *I. Egyptian Legal System*

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and Manu in India; but that in all three also the bull was the animal held sacred as his emblem.

Some of these royal legislators' names are preserved in fame, for the codes which they promulgated. The greatest was Harmhab, who lived about B. C. 1300; and a portrait statue of him has survived into modern times.<sup>5</sup> Most of the statues that are extant are conventional figures; but this one happens to be a portrait-statue, and it has thus a rare impressiveness. (The great Harmhab, by the way, had married the aunt-in-law of King Tut-ankh-amen, who has in modern times been brought to popular attention.)

The codes in Egypt were placed on the table in court in forty rolls before the judges. But the codes themselves have all disappeared—a colossal calamity for the history of law.

5. Yet the Egyptian legal transactions, both official and private, are amply preserved, to the triumph of modern archaeology.

By reason, however, of the four thousand years over which they range, covering a long period of linguistic development, they are found in a succession of four different scripts—the pictographic, the hieratic, the demotic, and the Greek.



I 5—HARMHAB, LEGISLATOR-KING

## *I. Egyptian Legal System*

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First came the hieroglyph,<sup>6</sup> or pictograph—a symbolic word-picture, apparently the first script-invention of the human race; this was often in colours, painted on the walls. In this earliest form of script, few strictly legal transactions or judicial records have yet been found. But one of the very first international treaties in world's history is recorded in this script, on the wall at Karnak.<sup>7</sup> This was the treaty of peace between Ramses II and the king of the invading Hittites, about B. C. 1300. Its provisions about extradition reveal the arrival of the Egyptians at the practical use of some of the standard concepts of modern jurisprudence:<sup>d</sup>

[*Extradition Clauses in Ramses II's Treaty.*] "Treaty made between the great chief of Kheta . . . and the great ruler of Egypt . . . a treaty of peace and fraternity, making peace between them forever. . . .

"Article 9. If any official of the territory of Egypt shall abscond and come to the great chief of Kheta, . . . he shall not receive them into his service, but shall deliver them back to the great ruler of Egypt their sovereign. . . .

"Article 11. Or if any official shall abscond from the territory of Kheta and come to the great ruler of Egypt, . . . he shall not receive them into his service, but shall deliver them back to the great chief of Kheta. . . .

"Article 16. But any man who may thus abscond and be delivered back to the great ruler of Egypt shall not be prosecuted for his offence; his property shall not be seized nor his wives nor children, nor himself be put to death nor mutilated; he shall not be prosecuted for his offence.



I. 6—HIEROGLYPHIC SCRIPT, OR PICTOGRAPH  
 This passage is from a wall in the Pyramid of Gizeh







I. 7—RAMSES II'. TREATY WITH THE HITTITES  
Recorded on the wall at Karnak; this is one of the first international treaties in the  
world's history, dating about B. C. 1300

## 1. *Egyptian Legal System*

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"Article 17. Likewise any man who may thus abscond and be delivered back to the great chief of Kheta shall not be prosecuted for his offence; his property shall not be seized nor his wives nor children, nor himself be killed nor mutilated; he shall not be prosecuted for his offence."

The second and later kind of script was the hieratic—a shortened form, used by the educated classes. In this form we possess a will, from the reign of Amenemhet III, perhaps the oldest testamentary document now extant in the world;<sup>8</sup> the best authorities place it about B. C. 1805. There are older records of gifts serving the purpose of wills, but this is one of the oldest testamentary documents. In its form and style, it shows already an advanced technique; it reads:<sup>e</sup>

[*Will of Uah.*] "I, Uah, devise to my wife Sheftu, the woman of Gesab called Teta, daughter of Sat Sepdu, all properties given to me by my brother Ankh-ren. She shall give it to whomsoever she may see fit of her issue born to me.

"I devise to her the Eastern slaves, 4 persons, that my brother Ankh-ren gave me. She shall give them to whomsoever she may see fit of her children.

"As to my tomb, let me be buried in it with my wife alone.

"Moreover, as to the house built for me by my brother Ankh-ren, my wife shall dwell therein and shall not be evicted by any person.

"The deputy Sebu shall act as guardian of my son. Done in the presence of these witnesses:

"Kemen, Decorator of Columns,

"Apu, Doorkeeper of the Temple,

"Senb, son of Senb, Doorkeeper of the Temple."



I. 8—WILL OF UAH

The oldest known testamentary document, dating about B. C. 1800

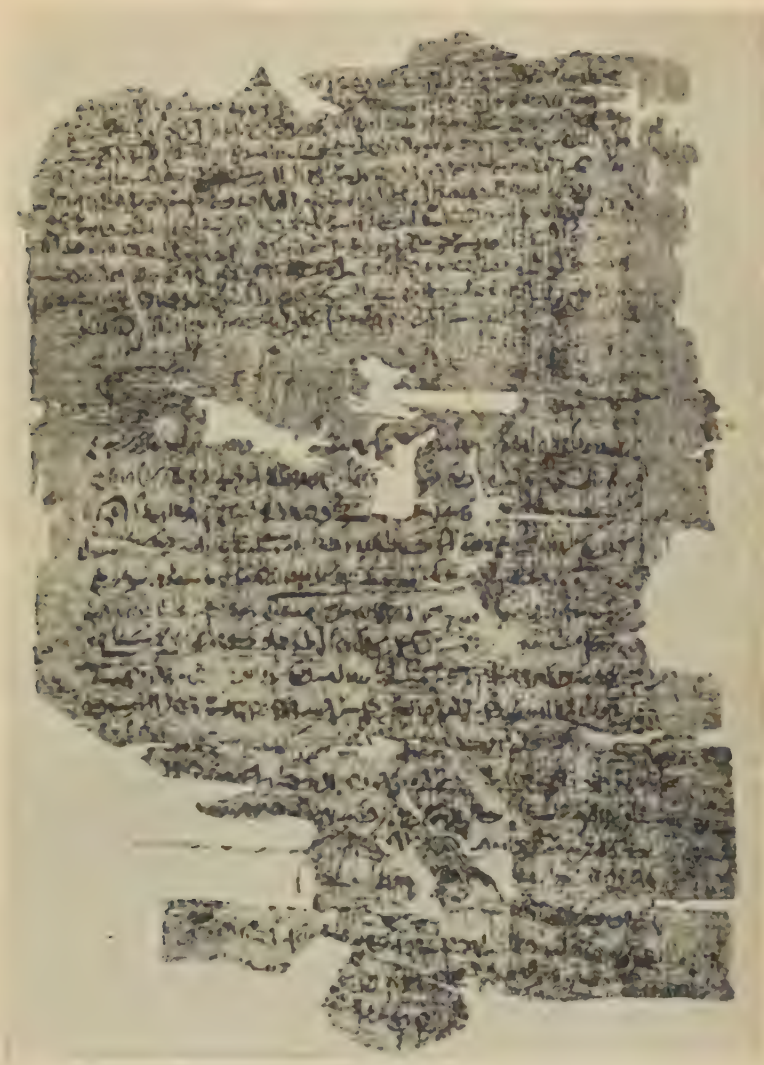
## 1. *Egyptian Legal System*

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The third kind of script was the demotic—a cursive and popular form. An example of the demotic script is found in a bond<sup>9</sup> given for the release of a jail-prisoner, about B. C. 250; apparently the transaction is analogous to the early English “mainprise”; here a party sentenced to imprisonment is bailed out, for economy’s sake, as temporary serf to some citizen or official who executes this document promising to produce the prisoner on demand of the inspector:<sup>f</sup>

[*Bail-Bond.*] “Year 39, 20th day of month Tybi, reign of king Ptolemy. Teos, son of Pozz, whose mother is Herieus, farmer of the royal domain of the township of Souchos Arsinoe, chief watchman of the district of Themistes. I hereby go bail for the farmer Gyl-Isis, son of Thotemheb whose mother is Tatemounis [note that the party identifies himself through his grandmother, not his grandfather], who is imprisoned by thine order. Thou hast entrusted him to me, and I will cause him to appear before thee or thy representative in the township of Souchos Arsinoe and the district aforesaid, from and after the said date at any time when thou shalt come to inspect the said district. If thou reclaimest him, I will bring him to the place which thou shalt designate in the township on five days’ notice, whenever thou shalt come on inspection, without any privilege for him to take sanctuary in a divine temple or at a king’s altar or a place of swearing or a place of asylum. If thou reclaimest him, and I do not bring him to the place designated within five days after notice, at any time that thou mayest come to inspect the said district in the said township, I shall submit to any terms that may be imposed by thee, on the day next ensuing the said fifth day, without dispute or further delay. All my property, now or hereafter owned, shall be security for the obligation herein





I. 9—BAIL-BOND FOR A JAIL-PRISONER

The party sentenced to imprisonment is bailed out as temporary serf  
by the obligor of this instrument

## I. Egyptian Legal System

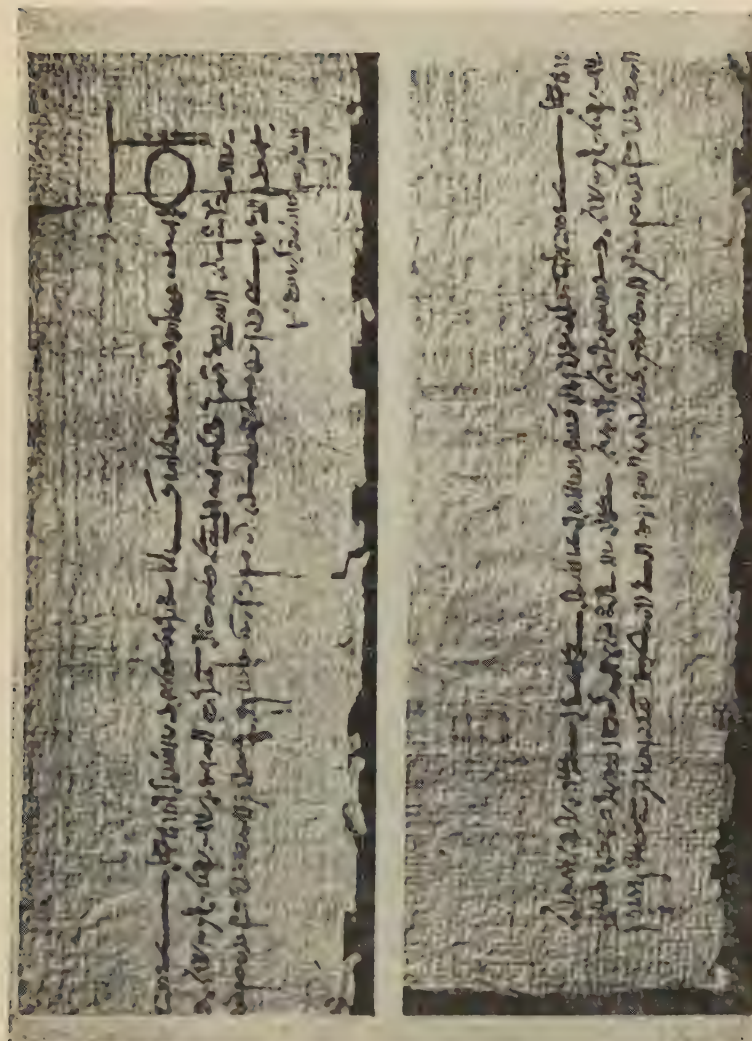
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described, until I shall have performed it to thee. I shall not be entitled to assert that I have performed all the terms of this instrument now delivered to thee. Thy representative is empowered to enforce any terms to be imposed on me under this instrument, and I will submit to his directions, unconditionally and promptly.—Written by [the notary] Marres, son of Neitheus”.

But the types of legal transaction represented in all these documents are numerous—marriage-contracts, deeds of land and of houses, leases, sales, wills, and all the familiar ones of every advanced system. In this marriage-contract (from the fourth century before Christ)<sup>10</sup> it is the woman who has the option of divorce, and retains the greater property-interest:<sup>g</sup>

[*Marriage-Contract.*] “In the month Athyr of year I of King Khabbash, the Lady Settyr-benne, daughter of Peteharpokrates and Semminis, has said to Teos, son of Pow and Nesoharpokrates: ‘Thou makest me thy wife, thou givest me two and a half silver staters as wedding-gift. If I divorce thee as husband, hating thee and loving another more than thee [!], I shall restore to thee one-half this wedding gift. I grant unto thee one-third of all my property acquired during our marriage. This contract, a duplicate handed to thee, is hereby acknowledged in the presence of sixteen witnesses, and shall not be changed without thy consent, either orally or in writing.’ Peteharpokrates, Notary.”

These terms illustrate one of the unique features of the early Egyptian system—the independence and equality of women with men in some legal relations; and the Egyptians are apparently the only race-stock that retained any institutions of equal woman-right, while also



I. 10—MARRIAGE-CONTRACT

From the 4th century B. C. Here the woman has the option of divorce.

## *I. Egyptian Legal System*

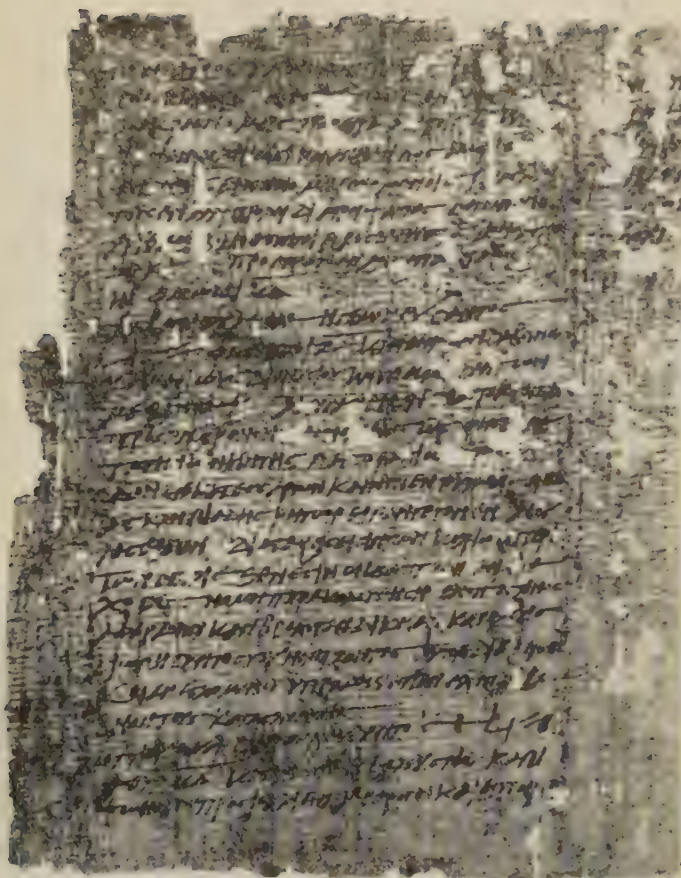
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advancing to a highly complex civilization. In sharp contrast with the above marriage-contract are some others dating under the Greek domination, two centuries later. In these later marriage-contracts it is the husband who speaks, and it is the husband who says, "If I divorce thee, I shall restore thy dowry"; and in these contracts the woman does not grant to the husband a share of her acquisitions during marriage, but brings to him at the wedding a dowry of specified value, which remains at her disposal. This contrast between the two types of marriage-contracts foreshadows the process of gradual undermining and transformation of the ancient native Egyptian system under the successive influences of Greek law, Roman law, and Mohammedan law, during the ensuing thousand years after Alexander the Great.

The fourth kind of script used in Egypt was the Greek. Its vogue is shown<sup>11</sup> in decisions by Roman praetors in Egypt, between Roman parties, written on papyrus in Greek, and dating in the third century A. D. The Greek language came widely into use under the domination of Alexander and his successors, three centuries before Christ, and remained as the standard script for centuries, even under the Romans and down to the time of the Arabs.

6. There was no profession of advocates in the Egyptian system; the parties were supposed to plead





I. 11—ROMAN LAW IN GREEK SCRIPT IN EGYPT  
A decision of a Roman praetor between Roman parties



## *I. Egyptian Legal System*

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their causes in person, and orally, before an examining judge. In one inscription the Chief Justice warns the trial judge, "Be quiet while you listen to the words of the petitioner. Do not treat him impatiently. Wait until he has emptied his heart and told his griefs. A kindly judge rejoices the heart." But in the Supreme Court the case was decided on the record only. In the latest period of the Egyptian system, the Greek historian-traveler Diodorus has preserved for us a brief description of the proceedings;<sup>h</sup> and his comments on the difference between the royal courts of Egypt and the popular courts familiar to him in the Greek cities (*post*, Chap. VI) reflect traits of human nature that will be recognized by the modern lawyer:

"The judges are chosen ten each from Heliopolis, Thebes, and Memphis; and this court, it may be conceded, is in no way inferior to the Athenian Areopagus or the Spartan Senate.

"Upon assembling, this bench of thirty chooses from itself the best one as chief justice, and in his stead the city names another judge. The stipends for their maintenance and other necessities are supplied by the king, a much larger sum going to the chief justice. He used to wear hanging from his neck by a chain of gold an image made of the most precious stones, to which they give the name of Truth;

## 6. *Judicial Procedure*

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when this is put on by the chief justice, it marks the beginning of the proceedings. Then the eight books, in which are contained all the laws written out, being laid before the judges, the custom was that the complainant should present the particulars of his case in writing, first the charge, then the facts, and then the amount of damage done. Next, the defendant, after receiving from the complainant the document of complaint, answers in writing each point, by asserting either that he did not do it; or that if he did it was not wrongful; or, if it was, it merits a less penalty. Then the complainant replied in writing, and the defendant made a second answer.

“After the parties had thus twice presented their case in writing, then it was the task of the thirty judges to discuss among themselves their judgment and of the chief justice to hand the image of Truth to one or the other of the parties [in token of obtaining the judgment].

“Such among the Egyptians is the manner of conducting all formal proceedings of the courts [i. e. without any speeches from advocates]. For they believe that from speeches of advocates much clouding of the legal issues would result; the cleverness of the speakers, the spell of their delivery, the tears of the accused, influence many persons to ignore the strict rules of law and the standards of truth. For very often [in other countries]

## *I. Egyptian Legal System*

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one sees experienced members of courts, whether through fallacious argument or pleasing voice or compassionate emotion, swept away by the eloquence of the speaker; whereas [the Egyptians] believe that if the parties themselves submit their case in writing, the bare facts alone being thus taken into account, a more correct judgment will be reached; and thus the readier speakers will gain no advantage over the slower ones, nor the skilled over the unskilled, nor the bold lying ones over the diffident truthful ones; but that all will have equal opportunity before the law by simply allowing ample time for the parties to study their pleadings and for the judges to deliberate and decide upon the allegations of the respective parties."

We do not possess the pleadings themselves, but we have some court records of them. This papyrus, preserved in the hieratic script, is the oldest court record in the world yet discovered; it dates from about twenty-five hundred years before Christ.<sup>12</sup> The record says:<sup>i</sup>

[*The Oldest Court Record.*] "The party Sebekotep alleges that one Usser, now deceased, father of the other party Thau, made the said Sebekotep to be guardian of his, the said Usser's wife and children, and to that end delivered all his property to the said Sebekotep, to be applied to the use of the said Usser's family, whether or not the property increased or decreased. But the party Thau denies that his father ever made any such conveyance.

"If the said Sebekotep produces credible witnesses who will make oath that the said Usser did in their presence deliver the



I. 12—COURT-MINUTE, ABOUT B. C. 2500  
The oldest extant court record in the world

## I. Egyptian Legal System

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property on the terms set forth in the said Sebekotep's written pleading, then the property is to remain in his possession. But if he does not produce such witnesses, then none of the said Usser's property shall remain in Sebekotep's possession, but shall be delivered to the said Thau, son of Usser."

Of civil cases, few records have yet been discovered. But the celebrated lawsuit of Mes v. Khay is preserved in fragments ample enough to reveal a highly developed system of judicial inquiry and formal litigation. This case took place in the reign of Ramses II (say, B. C. 1300). It was an appeal from a prior judgment, forming apparently the fifth stage in a long series of lawsuits over the title to land. Mes, the appellant, asserts that the prior judgment in favor of Khay, the appellee, had been obtained by the use of fraudulent entries in a land register affecting the party's descent and by forged documents of title. The final judgment on this appeal is unfortunately missing in the papyrus; but the parties' briefs, and the abstract of testimony, read as follows:<sup>j</sup>

[*Lawsuit of Mes v. Khay.*] [1. *Brief of the Plaintiff Mes.*] [*a. Early History of the Estates of Neshi.*] What was said by the . . . of the bearer of weapons, who . . . Rameses, Mes.

"As for me, I am the son of Hui, the son of Urnero, the daughter of Neshi. A division of property was made for Urnero and her brothers and sister in the Great Court in the time of Horemheb. They sent the clerical Iniy, who was an officer of the Great Court, to the district of Neshi: and a division was made for me and my brothers and sisters; and they made my mother, the dweller in the



## 6. *Judicial Procedure*

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town, Urnero, administrator for her brothers and sisters. Then Takharu, the sister of Urnero, pleaded together with Urnero before the Great Court. The court officer was sent forth, and they caused each of the six heirs to take cognisance of his portion. Now the king Amosis I had given . . . arourae of land as a reward to Neshi my father. And further, since king Amosis I, this land was held by one heir after another until this day. Then Hui, my father, and his mother Urnero pleaded together with their brothers and sisters before the Great Court and the Court of Memphis . . . writing.

“Then my father Hui died.

[*b. The Litigation between Nubnofret and Khay.*] “And Nubnofret my mother came to till the portion of Neshi my [grand] father, but she was not allowed to till it. Then she laid a plaint against the administrator Khay, and they caused them to appear before the Court in Heliopolis in the year 14 . . . of King Ramses II. Then . . . laid a plaint saying: ‘Of a truth I am cast forth from this land of Neshi my father.’ Then she said: ‘Let there be brought to me the registers from the Treasury, and likewise from the Department of the Granary of Pharaoh. For I am well pleased to say, that I am the daughter of Neshi. Division was made for me together with them, but the administrator Khay does not know my right as a sister.’

“The administrator Khay laid a plaint in the Great Court in the year 18, and they sent forth the clerical Amenemiofet, who was an officer of the Great Court, together with him, having a false register in his hand, whereby I ceased to be a child of Neshi. And they made the administrator Khay administrator for his brothers and sisters in the place of my heirship, although I was an heir of Neshi my father.

[*c. Mes Appeals against the Judgment in Favour of Khay.*] “And now see! I am in the district of Neshi my [grand] father, in which is the land of Neshi my [grand] father. Let me be examined and

## *I. Egyptian Legal System*

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let me see whether Urnero was the mother of Hui my father, who was called the son of Neshi, although she is not duly enrolled in the register, which the administrator Khay made against me together with the court officer who came with him. I bring a plaint saying: it is a false register that has been made against me. For verily when I was examined before, I was found to be inscribed. Let me be examined together with my coheirs before the notables of the town, and let me see whether I am the son of Neshi, or whether it is not so."

[2. *Brief of the Defendant Khay.*] [*a. Khay's Version of the Early History of the Estates.*] What was said by the administrator Khay.

"I am the son of the administrator Userhat, the son of Thau . . . . the son of Prehotep. He gave to me his portion of lands in writing in the time of king Horemheb before witnesses; and it was the chief of the stable Hui the son of Prehotep who had tilled it since the time of king Amenothès. I succeeded to him in the time of Horemheb unto this day. Then the scribe Hui and the dweller in the town Nubnofret seized my portion of lands: and she gave them to the artificer Khay iri.

[*b. The Lawsuit between Khay and Nubnofret.*] "Then I laid a plaint before the Judge in Heliopolis, and he caused me to plead together with Nubnofret before the Judge in the Great Court. I brought my testimonies . . . in my hand since Amosis I, and Nubnofret brought her testimonies in like manner. Then they were unrolled before the Judge in the Great Court. And the Judge said to her: 'These documents were written by one of the two parties.'

"Then Nubnofret said to the Judge: 'Let there be brought to me the two registers from the Treasury and likewise from the Department of the Granary.' And the Judge said to her: 'Very good is that which thou sayest.' Then they brought us downstream to Per-Ramessu. And they entered into the Treasury of

## 6. *Judicial Procedure*

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Pharaoh, and likewise into the Department of the Granary of Pharaoh, and they brought the two registers before the Judge in the Great Court. Then the Judge said to Nubnofret: 'Who is thy heir among the heirs who are upon the two registers that are in our hand?' And Nubnofret said: 'There is no heir in them.' 'Then thou art in the wrong,' said the Judge to her.

"Then the scribe of the royal table, Kha, the son of Mentuemmin, said to the Judge: 'What is the decision which thou makest with regard to Nubnofret?' And the Judge said to Kha: 'Thou belongest to the Residence. Go then to the Treasury, and see how the matter stands with her.' And Kha went out, and he said to her: 'I have examined the documents. Thou art not inscribed in them.'

"Then they summoned the clerical, Amenemiopet, and they sent him forth, saying: 'Call together the heirs, and show unto them the lands, and make a division for them.' So did they command him together with the Court of Memphis.

"Then I sent the . . . , Ruiniuma (?) . . . who was overseer of horses. And the officer of the court, Amenemiopet, summoned Mesmen, saying, 'Come': . . . Then they summoned him to the West bank. And they gave to me thirteen arourae of land and they gave lands to the coheirs before the notables of the town."

[3. *Evidence.*] "(1) What was said by the goatherd Mesmen: 'By Amon and by the Prince, I speak by the truth of Pharaoh, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. The scribe Hui was the son of Urnero, and, as they say, the son of Neshi. I saw . . . , Urnero . . . lands.'

"(2) What was said by the administrator Khay:

'By Amon and by the Prince. The scribe Hui was the son of Urnero the daughter of Neshi. And if . . . say: "It is not

## *I. Egyptian Legal System*

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truth", then let me be put to confusion. By Amon and by the Prince . . . . not . . . . cultivate . . . . beyond them. Their harvest was taxed . . . .'

"(3) What was said by . . . :

'By Amon and by the Prince, if they examine and if they find that I cultivated . . . . portion . . . . me, let me be put to confusion.'

"(4) What said by the priest of the temple of Ptah:

'By Amon and by the Prince, I speak in truth, and I speak not falsely; and if I speak falsely, may my nose and my ears be cut off, and may I be transported to Kush. I knew the scribe Hui the son of Urnero. He cultivated his lands from year to year, and he cultivated them saying: "I am the son of Urnero, the daughter of Neshi"'. .

"(5) What was said by the honey-maker of the Treasury of Pharaoh Hori:

'By Amon and by the Prince, if I speak falsely, may my nose and my ears be cut off and may I be transported to Kush. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.'

"(6) What was said by the chief of the stable Nebnefer:

'Likewise saying: 'As for the scribe Hui, he used to cultivate his lands from year to year, doing all that he desired. And they gathered in for him the harvest of his fields year by year. Then he pleaded together with the dweller in the town Takharu the mother of the officer Smentoui. And then he pleaded together with Smentoui her son, and they gave the lands to Hui, and they were duly confirmed to him.'

"(7) What was said by the . . . . Buthartef:

'Likewise saying: 'The scribe Hui was the son of Urnero, and Urnero was the daughter of Neshi.'

## 6. *Judicial Procedure*

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“(8) What was said by the dweller in the town Peihay:

‘By Amon, and by the Prince, if I speak falsely, may I be sent to the back of the house. The scribe Hui was the son of Urnero; and moreover, Urnero was the daughter of Neshi.’

“(9) What was said by the dweller in the town Pipuemuia:

“Likewise.

“(10) What was said by the dweller in the town Tuy:

“Likewise.”

The precise order of proceedings (apart from Diodorus' brief account, already quoted) has not been found described in any formal Egyptian treatise (and probably none such were composed). But one may gain an impression of the daily scene of justice in the great hall of Karnak from the inscription on the tomb of Rekhmire, chief judge, wherein the king's instructions describe the duties of that high official:<sup>k</sup>

[*Proceedings in Court.*] “Arrangement of the sitting of the governor of the residence city, and chief judge of the Southern City, and of the court, in the hall of the chief judge. As for every act of this office, the chief judge, while hearing in the hall of the chief judge, shall sit upon a chair, with a rug upon the floor, and a dais upon it, a cushion under his back, a cushion under his feet, a . . . upon it, and a baton at his hand; the forty rolls of the law shall be open before him. Then the magnates of the South shall stand on the two aisles before him, while the master of the privy chamber is on his right, the receiver of income on his left, the scribes of the chief judge at his either hand; one corresponding to another, with each man at his proper place.

“One shall be heard after another, without allowing one who is behind to be heard before one who is front. If one in front says:



## *I. Egyptian Legal System*

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'There is none being heard at my hand' then he shall be taken by the messenger of the chief judge.

"Let not any official be empowered to judge against a superior in his hall. If there be any assailant against any of these officials in his hall, then he shall cause that he be brought to the chief judgment-hall. It is the chief judge who shall punish him, in order to expiate his fault. Let not any official have power to punish in his hall . . . .

"As for every process-deputy whom the chief judge sends with a message for an official, from the first official to the last, let him not be swerved, and let him not be conducted; the official shall repeat the chief judge's message while the deputy stands before the official repeating his message and going forth to wait for him. The deputy shall have power to seize the mayors and village elders for the judgment-hall; . . . .

"Now, as for every act of the chief judge, while hearing in his hall; and as for every one who shall . . . . . he shall record everything concerning which he hears him. He who has not disproved the charge at his hearing, which takes place . . . . . then it shall be entered in the criminal docket. He who is in the great prison, not able to disprove the charge of the chief judge's warrant, likewise; when their case comes on another time, then one shall report and determine whether it is in the criminal docket, and there shall be executed the things concerning which entry was made, in order to expiate their offense.

"As for any writing sent by the chief judge to any lesser official's hall, being those which are not confidential, it shall be taken to him together with the documents of the keepers thereof under seal of the . . . officers, and the scribes thereof after them; then he shall open it; then after he has seen it, it shall return to its place, sealed with the seal of the chief judge. But if he furthermore ask for a confidential writing, then let it not be taken by the keepers thereof.

## 6. *Judicial Procedure*

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"Now, as for every petitioner to the chief judge concerning lands, he shall dispatch the process-deputy to him, in addition to a hearing of the land-overseer and the local council of the district. He shall decree a stay for him of two months for his lands in the South or North.' As for his lands, however, which are near to the Southern City and to the court, he shall decree a stay for him of three days, being that which is according to law; for he shall hear every petitioner according to this law which is in his hand.

"Every property-list is brought to the chief judge; it is he who seals it.

"It is he who administers the gift-lands in all regions. As for every petitioner who shall say: 'Our boundary is unsettled;' one shall examine whether it is under the seal of the official thereof; then he shall seize the seizures of the local council who unsettled it.

"One shall put every petition in writing, not permitting that he petition orally. Every petitioner to the king shall be reported to the chief judge after he puts it in writing.

". . . . . The records of the township are in the chief judge's hall. It is he who hears concerning all lands. It is he who makes the boundary of every township, the field . . . . all divine offerings and every contract.

"It is he who takes every deposition; it is he who hears the rejoinder when a man comes for argument with his opponent.

"It is he who appoints every special judge to the hall of judgment, when any litigant comes to him from the king's house. It is he who hears every edict.

"Every report shall be reported to the chief judge by the door-keeper of the judgment-hall, who reports on his part all that the chief judge does while hearing in the hall of the chief judge."

Several elaborate records of important criminal trials are fortunately extant. Examining magistrates were

## I. Egyptian Legal System

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deputed to take testimony; and their full report of the testimony and findings was entered as a record of the trial. One of these trial records<sup>14</sup>—a sensational one, for treason—some twelve hundred years before Christ, opens with a warrant from the king himself, Ramses III, appointing a special high commission court for this case. It reads:<sup>1</sup>

[*Royal Warrant Appointing a Special Court.*] "I, the king, direct that search be made throughout the land and the persons be arrested and put on trial who are reputed by public ill-fame to have done this treason. And I commission the Lord High Chamberlain, the Lord Chancellor [etc., etc., naming them] for the purpose. I know nothing of the truth of the charges. Do you examine into them, and then cause the guilty ones to die, either by their own hand or by the executioner; and this without further reference of the case to me in person. Take great heed that the innocent be not punished. But let the deeds of those who are guilty fall surely upon their own heads, that I may be protected and defended forever on my throne, as a just king in the sight of Ammon, chief of gods, and Osiris, ruler of Eternity."

In the rest of this record it appears that there were four sets of accused: the principals, the accomplices in two degrees, and the innocent. The first set were executed; the second set were required to commit suicide; the third set suffered the slicing off of their noses and ears. The entry in the record for the second set reads thus:

"The following persons were charged with conspiracy with the principals; they were brought before the special court for trial; they

ॐ नमो भगवते वासुदेवाय ॥ १ ॥  
 श्रीकृष्णाय नमः ॥ २ ॥  
 श्रीगुरुभ्यो नमः ॥ ३ ॥  
 श्रीगणेशाय नमः ॥ ४ ॥  
 श्रीविष्णवे नमः ॥ ५ ॥  
 श्रीशिवाय नमः ॥ ६ ॥  
 श्रीब्रह्माय नमः ॥ ७ ॥  
 श्रीमहेश्वराय नमः ॥ ८ ॥  
 श्रीनारायणाय नमः ॥ ९ ॥  
 श्रीरामाय नमः ॥ १० ॥  
 श्रीकृष्णाय नमः ॥ ११ ॥  
 श्रीगुरुभ्यो नमः ॥ १२ ॥  
 श्रीगणेशाय नमः ॥ १३ ॥  
 श्रीविष्णवे नमः ॥ १४ ॥  
 श्रीशिवाय नमः ॥ १५ ॥  
 श्रीब्रह्माय नमः ॥ १६ ॥  
 श्रीमहेश्वराय नमः ॥ १७ ॥  
 श्रीनारायणाय नमः ॥ १८ ॥  
 श्रीरामाय नमः ॥ १९ ॥  
 श्रीकृष्णाय नमः ॥ २० ॥

I. 14—RAMSES III's SPECIAL HIGH COMMISSION FOR TRIAL OF TREASON

## *I. Egyptian Legal System*

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were tried and found guilty; they were allowed to die by their own hand in the place of trial, and they did so, and were not executed.”

The analogy here to the Japanese theory of *hara-kiri* is striking; and those two systems appear to be the only legal systems adopting that form of penalty.

That the system of judicial investigation was well developed appears plainly in the record of the famous Tomb-Robbing Trial, in the reign of Ramses IX; the incidents of this scandal, echoing down the ages, have been remarkably corroborated by the excavations of modern archaeologists. It seems that in the metropolis of Thebes, where the richly jeweled tombs of the Pharaohs were located, rumors of the plundering of the tombs came to the ears of Peser, mayor of the East side, and he laid information before the chief judge. The tombs were on the west side of the city, under a second mayor, Pewero, apparently a political rival of the other mayor. The chief judge sent deputies to inspect the tombs, and some of them were found to be uninjured. Some of Pewero's subordinates, treating this as a vindication of his administration, proceeded to the house of the other mayor, Peser, and exulted publicly, to his chagrin. He angrily retorted that the inspection had been a farce. This slander was reported promptly to the chief judge, who then directed a trial of the three



## o. *Judicial Procedure*

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coppersmiths, employees of a temple, who had been accused of robbing these particular tombs, and one of whom had confessed when arrested and examined under the lash. The first passage here quoted shows the method used to test the truth of his confession; the second is the record of the final trial:<sup>m</sup>

[*Trial of the Tomb-Robbers.*] [*Examination of the Coppersmith.*]  
"Then the chief judge and the butler had the coppersmith taken before them to the tomb, while he was blindfolded as a man . . . . He was permitted to see again, when he had reached them. The officials said to him: 'Go before us to the tomb, from which you said: "I carried away the things"'. The coppersmith went before the nobles to one of the tombs of the king's children . . . . in which no one was buried, which was left open, and to the hut of the workman of the necropolis . . . . which was in this place saying: 'Behold, the tombs in which I was.' The nobles examined the coppersmith with a severe examination in the great valley, but he was not found to know any place there, except the two places upon which he had laid his hand. He took an oath of the king, L. P. H., that he should be mutilated by cutting off his nose and his ears and placed upon the rack if he lied, saying: 'I know not any place here among these tombs, except this tomb which is open, together with the hut upon which I have laid your hands.' The officials examined the tombs of the great seats which are in 'The-Place-of-Beauty', in which the king's-children, king's-wives, king's-mothers, the goodly fathers and mothers of Pharaoh, L. P. H., rest. They were found uninjured."

[*The Trial.*] "Year 16, third month of the first season, day 21; on this day in the great court of the city; beside the two stelae of . . . . the forecourt of Amon in the gate called 'Praise'.

"People and nobles who sat in the great court of the city on this day:

## *I. Egyptian Legal System*

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"1. Governor of the City and chief judge, Khamwese. . . .

"2. The High Priest of Amon-Re, king of gods, Amenhotep. . . .

"3. The prophet of Amon-Re, king of gods, scribe of 'The-House-of-Millions-of-Years-of-King-Neferkere-Setepnere, L. P. H.', Nesuamon. . . .

"4. The king's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. . . .

"5. The major-domo. . . .

"6. The deputy. . . .

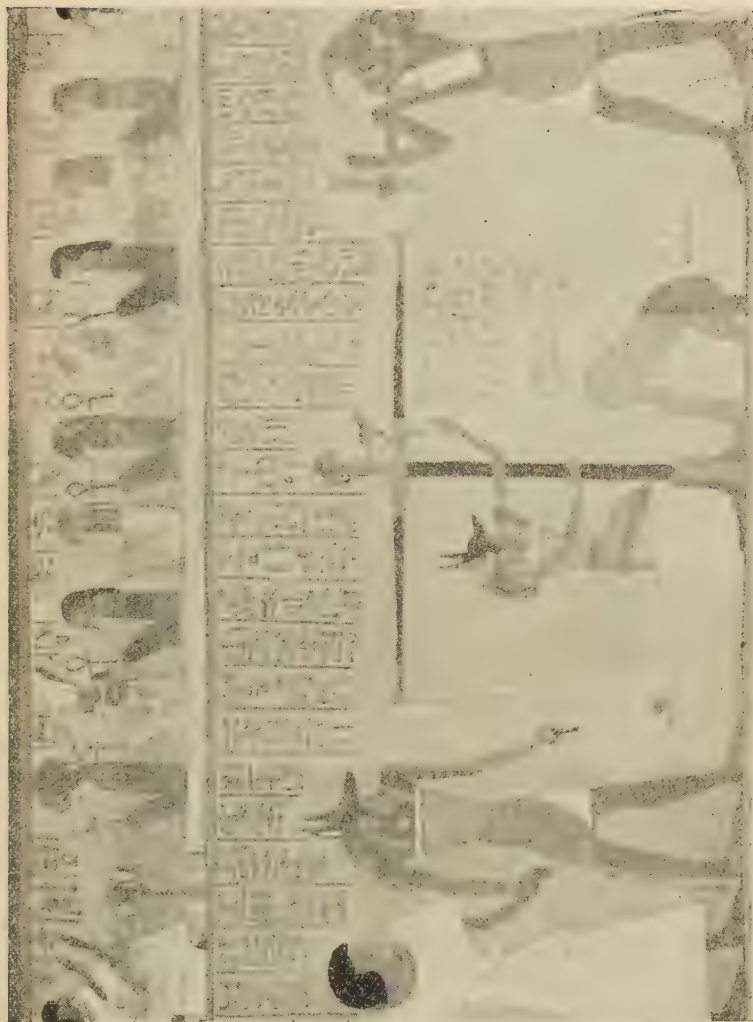
"7. The standard-bearer. . . .

"8. The mayor. . . .

"The governor of the city and chief judge, Khamwese, had brought in the coppersmith, Pekharu; the coppersmith, Tharoy; and the coppersmith Pekamen . . . .

"Said the chief judge to the great nobles of the great court of the city: 'This mayor of the city said a few words to the inspectors and workmen of the necropolis, in the year 16, third month of the first season, day 19, in the presence of the king's-butler, Nesuamon, the scribe of Pharaoh, L. P. H., delivering himself of slanders concerning the great seats, which are in The-Place-of-Beauty. Now, I, the chief judge of the land, have been there, with the king's-butler, Nesuamon, the scribe of Pharaoh, L. P. H. We inspected the tombs, where the mayor of the city said that the coppersmiths . . . . had been. We found them uninjured; and all that he said was found to be untrue. Now, behold, the coppersmiths stand before you; let them tell all that has occurred.' They were examined. It was found that the accused did not know any place in the cemetery of which the mayor had spoken the words. He was found wrong therein.

"The great nobles granted life to the coppersmiths . . . . They were reassigned to the High Priest of Amon-Re, king of gods, Amenhotep, on this day.



I. 15—TRIAL SCENE: Papyrus of Hunefer (Left Half)

The Soul of the departed one (the figure in white) answers for his life-conduct. The forty-two assistant judges, seated above, call over the list of offences. An official weighs in the balance the heart of the deceased against the goddess Maat's feather of justice.



## 7. *The Judgment Papyrus*

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"The documents thereof are: one roll; it is deposited in the office of the chief judge's archives."

7. The general features of the early Egyptian trial system are symbolized in a great papyrus, done in pictograph, representing the Judgment of the Dead. The soul of the departed one is summoned to appear before the great judge and sun-god, Osiris, in the Hereafter; the departed one here depicted was Hunefer, the king's chancellor.<sup>15</sup> In this scene, in the left half, Hunefer is called upon to defend his life-conduct before the judges. There were forty-two assistant judges; each one took cognizance of a specific offence, thus together covering the whole criminal code. The Soul pleaded "Not Guilty" to each offence, naming them one after another, thus:"

"I have not done evil.

"I have not robbed.

"I have not broken in to steal.

"I have not stolen secretly.

"I have not killed men.

"I have not sold wheat with light weight.

"I have not cheated.

"I have not robbed the temple of the God.

"I have not given false testimony.

"I have not stolen food.

"I have not blasphemed.

"I have not assaulted men.

"I have not committed adultery.

"I have not slandered", etc., etc.



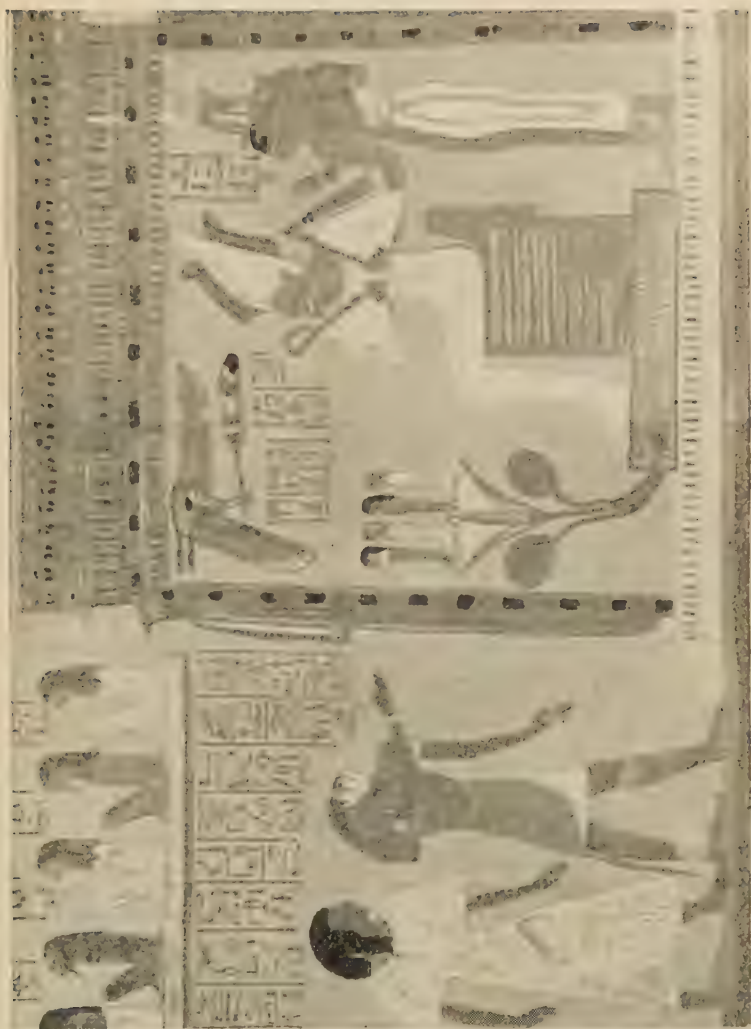
## *I. Egyptian Legal System*

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And the remarkable thing is that this mode of pleading is still found in modern times, four thousand years later, in some tribes on the West Coast of Africa; the accused, who is put to the ordeal of poison, first makes a series of declarations of his innocence of certain offences, and then drinks the red-water which the magic-doctor gives him.

In the Egyptian proceeding, the judges (seated above in the picture) call over the list of offences; and as the accused answers, an official weighs his heart in the balance on the left, against the Feather of Justice (of the goddess Maat) on the right. The scribe Thoth then announces (in the words of the inscription): "Saith Thoth, the scribe, lord of divine words: Behold, I am declaring, in the home of Osiris, the royal chancellor Hunefer to be true and just. His heart hath come forth in the scales, and hath not been found evil." This expression "true and just" was, in Egyptian practice, the conventional formula for "Not guilty"; and on every tombstone was inscribed this epithet, "true and just" (as a complimentary presumption that the departed one would be found innocent in the hereafter!)

In the case of acquittal, the soul is then led by Horus into the presence of Osiris, the sun-god and great judge of all, with this formula:<sup>16</sup> "Saith Horus, the deputy of his father Osiris, and custodian of Hunefer: Behold, I am



I. 16—TRIAL SCENE: Papyrus of Hunefer (Right Half)  
 The acquitted Soul is led into the presence of Osiris, sun-god and great judge of all



## 8. *Final Submergence*

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bringing Hunefer to thee, Osiris. He hath been judged by the scales, the tongue of the balance resteth at its place."

8. The native Egyptian legal system, here typified in the proceedings before Osiris, the supreme last judge of all men, passed through many phases, and survived under several foreign dynasties. But it began to be undermined in the eighth century before Christ, first by civil war, then by conquests of invaders from Assyria, Persia, and Greece. Finally the Roman Caesars arrived to strike the fatal blow to Egypt's political independence.

And yet its end, just before the Christian era, was marked by a scene which reveals how firmly the tradition of the divine judge Osiris still persisted in the hearts of the native Egyptian people. For during those last days of luxurious Oriental festivity, in which Antony and Cleopatra recklessly indulged at Alexandria, while the shadow hung over them of Caesar Octavian's final impending blow against Antony's power, Antony dared to court popularity before the Egyptian multitude by personating the sun-god Osiris, with Queen Cleopatra as his consort Isis.

But Cleopatra was to be the last queen of Egypt. By the defeat of Antony and Cleopatra at the battle of Actium, their dominion was shattered. The cold imperi-

## *I. Egyptian Legal System*

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ous will of Caesar Octavian was proof against Cleopatra's last appeal to him for her kingdom and herself. In death she sought refuge from her chagrin. Egypt, with its Pyramids four thousand years old, became a mere Roman province. Roman law and government supplanted more or less of the native institutions. Seven centuries later the Arab conquerors brought Islamic religion and law. After another thousand years the international court brought the French Code.

And scholars still dispute, as they examine the tons of records embodied in five successive languages, whether particular legal customs of the later Egyptian people are to be traced back to the legal systems of the Pharaohs, or the Greeks, or the Romans, or the Arabs. But today the Pyramids and the pictographs and the papyri are the only sure symbols of the native Egyptian institutions of six thousand years ago.



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2. *Audience Hall at Philae*. From a drawing reproduced in "Bilder-Atlas," vol. V, Architecture, plate 2, No. 2 (F. A. Brockhaus, Leipzig, 1875).
3. *Maat, Goddess of Justice*. From a photograph furnished by the Museum of Ethnography, Florence, of the original in that Museum (1923).
4. *Ramses III's Domesday Book*. From a photograph furnished by Dr. T. George Allen, Oriental Institute of the University of Chicago, of the facsimile, plate 79, in Samuel Birch's edition of the Papyrus Harris (British Museum, 1876).
5. *Harmhab, the Legislator-King*. From a photograph by the Metropolitan Museum of Art, New York (1924), of the original in that Museum.
6. *Hieroglyphic Script*. From a facsimile of a script on the Pyramid of Gizeh, in *Karl Faulmann*, "Illustrierte Geschichte der Schrift", p. 238 (Leipzig, 1880).
7. *Ramses II's Treaty with the Hittites*. From a photograph furnished by Dr. T. George Allen, Oriental Institute of the University of Chicago, of a photograph of the original by Prof. Ludwig Borchardt, Berlin (1925).
8. *Will of Uah*. From a photograph furnished by John A. Wilson, Oriental Institute of the University of Chicago, of a facsimile in *F. Ll. Griffith*, "Hieratic Papyri from Kahun and Gurab", of the original in London University Museum.
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12. *Court-Minute, B. C. 2500*. From a photograph furnished by Dr. T. George Allen, Oriental Institute of the University of Chicago, of a photograph by Prof. Borchardt, of No. 9010, the original papyrus in the Berlin National Museum (1925), as reproduced in Möller, "Hieratische Paläographie", vol. I, pl. 2.

## I. Egyptian Legal System

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- e. Will of Uah. From the translation in Griffith, cited *supra*.
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THE  
MESOPOTAMIAN  
LEGAL SYSTEM





## II

### *The Mesopotamian Legal System*

1. Babylonia and Assyria—their mixed stocks.
2. Development of literature and commerce—Cuneiform records of commerce and law.
3. Deed of storehouse—Warranty deed—Stone landmark—Marriage-settlement.
4. Commercial transactions—Promissory note payable to bearer—Banking records—Partnership records.
5. Judicial system—Judgment in a boundary suit—Lawsuit over a will—Action for unpaid purchase-money—Action by a widow claiming land—Petition of an accused under arrest.
6. Legislation—Sumerian code—Parable of the prodigal son—Hammurabi code—Codes of Hammurabi, Assur, and Deuteronomy, compared.
7. Daniel and the Handwriting on the Wall—Fall of Babylon.



II. 1—MAP OF THE MESOPOTAMIAN REGIONS  
at the period of the Assyrian Empire



## *II. Mesopotamian Legal System*

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years before Christ. It endured amidst successive waves of conquest from east, north, and west, absorbing one after another. It lost its racial independence under the Persians, about 500 years before Christ, and disappeared under the Greeks, about 100 years before Christ.

2. Mesopotamia was notable for two things: first, for its early development of original and elaborate forms of art and literature, and the diffusion of those attainments among all Semitic peoples; and secondly, for its specially high development of commerce, and thus, distinctively, of commercial custom and law. The records of law, commerce, and literature, in vast quantities of thousands, have been found well preserved in libraries or archives, and in such bulk that modern philologists have yet not even had time to study and translate more than a small portion of them.

These records are virtually all in cuneiform script. This script is chiefly a sign-language; that is, each character represents a whole word or idea; thus, there were several thousands to learn, as in Chinese. This cuneiform script was itself a development from the pictograph, or hieroglyph, by abbreviation;<sup>3</sup> and dictionaries were in use, showing the pictograph at the left and the cuneiform at the right of each column. Still later, the Aramean branch of the Semites brought into use a genuine alpha-



## 2. *Cuneiform Records*

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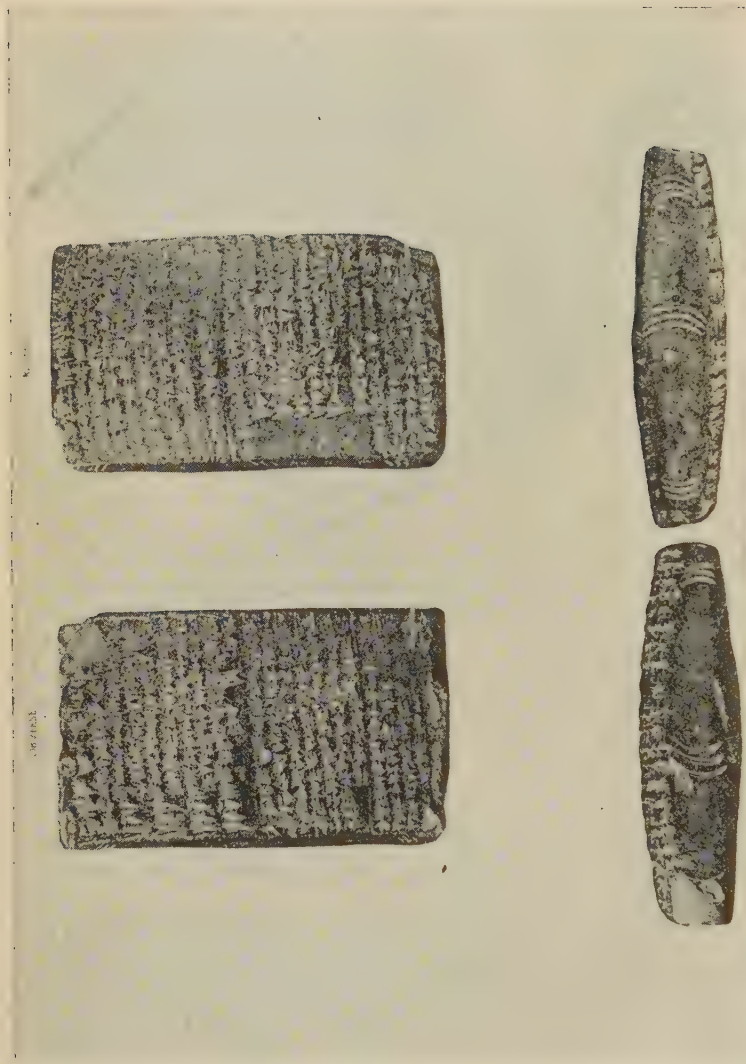


II. 3—EARLY PICTOGRAPH

This is a leaf of a dictionary showing the equivalents of the pictograph in cuneiform

bet,—that is, a script in which each character represents one of the few elemental sounds or syllables which when combined form all words; and this alphabet was one forerunner of the modern European alphabet. But during the whole period of Babylonia and Assyria, the cuneiform was the vehicle of all records.

These records were chiefly made on small tablets, or biscuits, of hard clay, usually some three inches long, two inches wide, and one inch thick, inscribed by a wooden stylograph with wedge-shaped, or cuneiform, characters; this document here shown is a deed of a warehouse, some



II. 4—DEED OF WAREHOUSE, B. C. 600

### 3. *Conveyancing*

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600 years B. C.<sup>4</sup> Both front and back of the tablet were used for the writing; and the half-moon shaped lines on the two narrow margins of the tablet were made by the parties' thumb-nails, impressed perhaps for identification. Modern archaeologists re-transcribe these tablets in standard script,<sup>5</sup> capable of being set up in printed type; and thus other scholars, all over the world, may share in these studies.

3. In these Mesopotamian deeds, lawyers of today will recognize, in germ, the standard provisions of our own conveyancing practice. In this deed, for example, are mentioned the description of premises, the total area, the parties' names, the price, the recital of price received, the kind of title conveyed:<sup>a</sup>

[*Deed of a Storehouse.*] "A 12-reed storehouse, a finished house having a built-in threshold, a covered house with a door having a firm bolt, of the bright storehouse of Ezida; on the upper north side adjoining the storehouse of Bel-epush, son of Apla, son of Mubanni; on the lower south side adjoining the storehouse of Etillu, son of Marduk-abishu; on the upper west side along the Tarrabshu road; on the lower eastern side adjoining the storehouse of Nabu-iddina, son of Arkat-Damqu. Total 12 reeds is the measurement of that storehouse.

"With Bel-uballit, son of Amèlai, the riqqu of Marduk, Marduk-kudurri-usur, son of Irani-Marduk, the Tu officer of the house of Marduk, according to 3 minas, 10 shekels of silver for the half of the field,  $15\frac{3}{4}$  shekels, and 2 gerahs of silver and 5 kors of dates which were thrown in, he fixed as his full price. Total 3 minas, 10 shekels of silver and 5 kors of dates, the full price of his storehouse, Bel-

Obverse.

5  
10  
15  
20  
25

Handwritten text in Devanagari script, arranged in horizontal lines. The text is dense and appears to be a formal document or record. There are several lines of text that are partially obscured or cut off at the bottom of the page.

Reverse.

30  
35  
40  
45

Handwritten text in Devanagari script, arranged in horizontal lines. The text is dense and appears to be a formal document or record. There are several lines of text that are partially obscured or cut off at the bottom of the page.

### 3. *Conveyancing*

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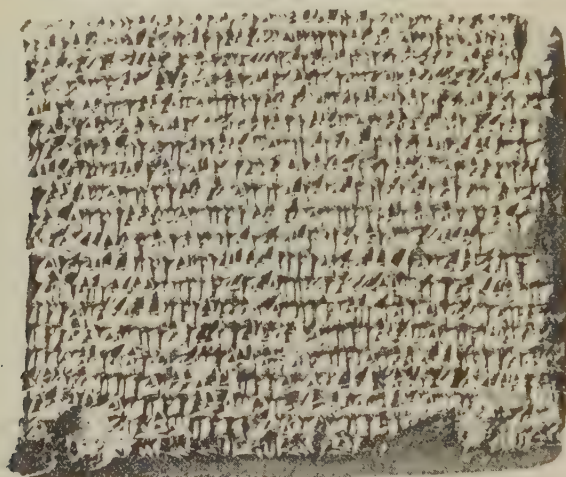
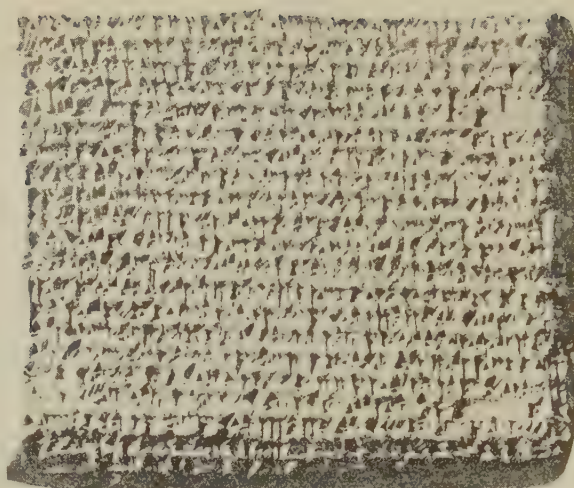
uballit, son of Apla, the riqqu officer of Marduk, received from Marduk-kudurri-usur, son of Irani-Marduk, the Tu officer of the house of Marduk. The buyer has a fee simple, there shall be no recourse. They shall not return and complain to one another."

Some of these deeds were elaborate in their terms, and required tablets larger than the ordinary ones.<sup>6</sup> For example, in the deed here shown (about B. C. 300) the distinction between a quitclaim-deed and a warranty-deed had been already devised; this document ends with a clause which not only warrants the title and engages to pay a multiple penalty for a breach of the warranty, but brings in a third person as surety for the grantor's performance:<sup>b</sup>

[*Warranty Deed.*] "The money, namely, 6 shekels, the full price of said estate, Anu-belzer, received from Ia; he has been paid. If a claim is established against said estate, Anu-belzer the seller of the estate, and Anu-apaliddannu his brother, sons of Anu-ab-usur, shall make good twelve fold, and shall pay to Ia for future time. They bear responsibility for one another for the guaranty of said estate to Ia, for future time. That estate belongs to Ia the daughter of Nana-iddin, the wife of Ribat-Anu, the son of Labashi, the builder, for future time."

But, besides the deed itself, a stone landmark or record is frequently found. The stone was set up on the plot of land, and on the stone was inscribed the description of the plot, the names of grantor and grantee, and a warning against adverse claims. This record-stone was not itself the source of title; but its precise relation to the original deed has not yet been clearly ascertained. Here is an





II. 6—WARRANTY-DEED, B. C. 300

The distinction between a quitclaim-deed and a warranty-deed had already been devised

### 3. Conveyancing

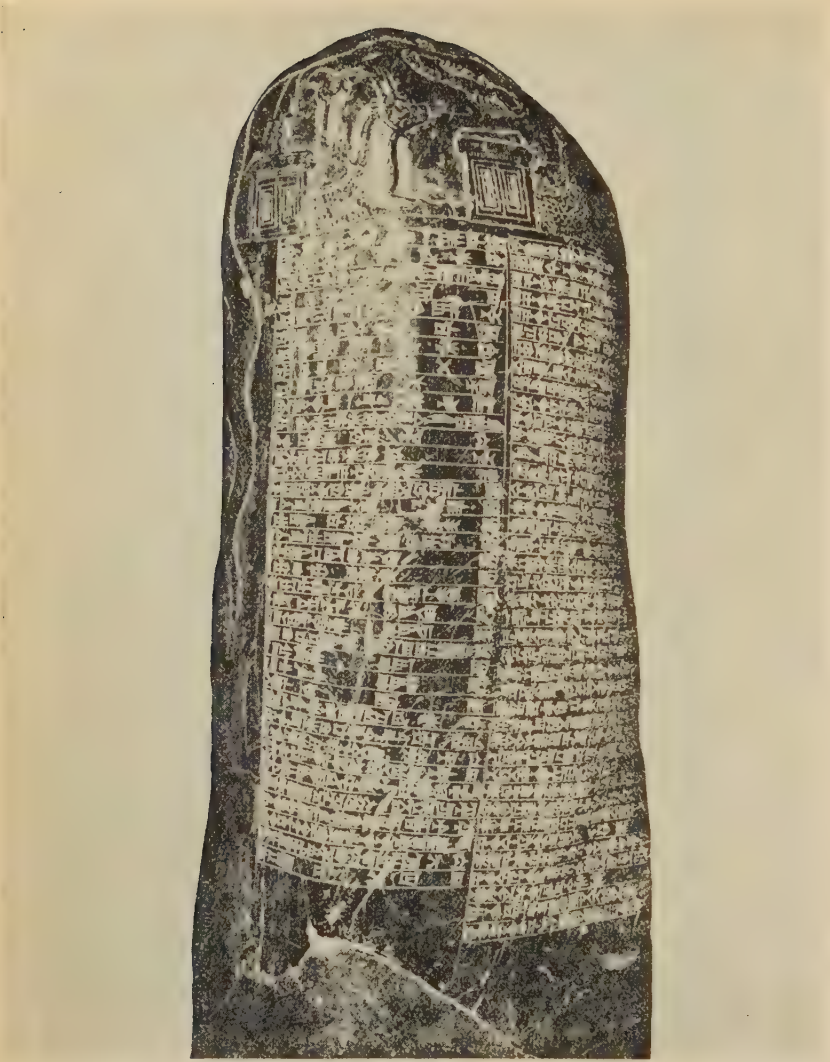
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example from about B. C. 1100;<sup>7</sup> it reads thus, in condensed translation:<sup>c</sup>

[*Boundary-Stone.*] "This stone is named Perpetual Fixer of Landmark. One acre of corn-land, rated at 5 bins of seed, lying along the Baddar Canal and Khanbi estate, bounded by Khanbi estate on the north, by Imbiati estate on the south, by Khanbi estate on the west, and by the canal bank on the east, bought from Amel Enlil by Marduk-nasir and surveyed by Shapiku, for the price of 1 chariot value 100 shekels silver, 1 western ass value 30 shekels silver, 2 saddles value 50 shekels silver, 1 ox value 30 shekels silver [etc., etc.] . . . . If any agent or official of the said Khanbi estate shall lay claim to or take this land or shall wrongfully reclaim it or transfer it to any other party, or shall dispute this grant from the king, or shall send any fool or blind man or ignorant person to remove or destroy or hide this landmark, may the great gods curse him with incurable evil. May Shamash judge of heaven smite his countenance. May his posterity perish among the people. This stone is named Perpetual Fixer of Landmark."

These Mesopotamian documents range over every variety of legal transaction,—deed, lease, loan, sale, deposit, bill of lading, adoption, partition, agency, partnership, marriage-contract, and other familiar types. Here, for example, is a marriage-settlement, about B. C. 600, providing carefully in three contingencies for descent of the property as between the children of the first and the second wife:<sup>d</sup>

[*Marriage-Settlement.*] "In the second year of Nabopolassar, king of Babylon, spoke Nabu-zer-kit-lishir, son of Kudurru, son of . . . . as follows: 'I have no child, [though I have a wife]; I



II. 7—STONE LANDMARK PILLAR, B. C. 1100  
The stone bears the description of the plot, the names of grantor  
and grantee, and a warning against adverse claims

## 4. *Commercial Instruments*

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wish a child; Kulla, thy daughter, give me as wife.' Bel-ikisha hearkened to Nabu-zer-kit-lishir, and Kulla, his daughter, a virgin, he gave him in marriage. In the day that Esagila-banata, his first wife, shall bear a child, two thirds of the estate shall be for her. In the day that Kulla shall bear a child one third of the estate of Nabu-zer-kit-lishir shall be for her. In the day that Esagila-banata childless dies, while Kulla has children, the entire estate of Nabu-zer-kit-lishir, in city and country, whatever there is, shall be for Kulla and her children.

"Witnesses: Asharidu, son of Piru, son of Shanishishu, Marduk-zer-ibni, son of Sukhaa. Document scribe: Mushezib-Marduk, son of Raba-sa-Addu. Babylon, month of Iyyar, fourteenth day, second year of Nabopolassar, king of Babylon."

4. The most advanced ideas in commercial law had already been reached in Mesopotamian transactions. Most remarkably, we find, as early as King Hammurabi's period, a promissory note payable to bearer, dated about B. C. 2100: it is the oldest negotiable instrument in the world, now known to us:<sup>c</sup>

[*Note Payable to Bearer.*] "5 shekels of silver, at the usual rate of interest, loaned by the Temple of Shamash and by I. Company, to Idin and his wife, are payable with interest on sight of the payors at the market-place to the bearer of this instrument."

And yet this fertile idea of transferability to bearer does not appear in European commercial law until the late middle ages.

Banking in Babylonia was highly developed. In recent years have been unearthed the records of one of

## II. *Mesopotamian Legal System*

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the greatest banking-houses in history, the house of Yegibi (or Jacob) and Sons, extending continuously through four successive centuries from B. C. 700 to 300; and their records show that the use of instruments payable to order was well known; as in the following instrument dating about B. C. 500:<sup>f</sup>

[*Paper Payable to Order.*] "3 gold minae, in specie, are receivable by B. from M. per note. Upon B's order, N. has collected from M. the amount with interest due under this note. N. has surrendered to M. the note calling for 3 gold minae receivable by B. from M."

Naturally, in so active and mature a commercial world, all varieties of agency, brokerage, and partnership (though not the share-corporation) are found represented in the recorded transactions. A few selections from the field of partnership will illustrate the wide range of typical instruments. The celebrated banking firm of Jacob (or, Yegibi), above-mentioned, through successive generations, figures in many of these partnership ventures, placing its capital with small undertakers for an agreed share of the profits. First we may look at a partnership undertaking from the reign of Darius:<sup>g</sup>

[*Partnership Contract:*] "50 bushels of dates, belonging to Marduk-nasir-aplu, son of Itti-marduk-balatu, son of Igibi, and 50 bushels of dates, belonging to Bil-ikisha, son of Labashi, son of . . . . ., have been put in together as partnership capital. Whatever profit, in town and country, shall be made on these 100



#### 4. *Commercial Instruments*

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bushels of dates shall be shared. The cottage at Borsippa located adjacent to the lot of . . . . ., foreman of [the first partner] Marduk-nasir-aplu and his brother, has been assigned to [the second partner] Bil-ikisha, at a yearly rental of  $\frac{1}{2}$  mina of money and one calf; the said Bil-ikisha to have possession of it for one year, and the rental to be paid out of the [first partner's] capital. The tools which [the first partner] Marduk-nasir-aplu will deliver to [the second partner] Bil-ikisha, he will deliver back at the end of the year, and he will also pay the taxes. Each party has a counterpart of this instrument. The south building is in possession of [the first partner] Marduk-nasir-aplu."

When the partnership-venture was completed, an instrument was signed, reciting an accounting, acknowledging the division of the profits, and mutually releasing from all claims; the following document, from the time of Nebuchadrezzar (about B. C. 600) is typical of scores:<sup>h</sup>

[*Partnership Release:*] "As to the business-capital used in partnership between Nabu-kin-aplu and his son Nabu-bil-shunu, and Shula son of Zir-ukin, and Mushizib-bil, . . . . . official, from the 8th year of Nabu-aplu-usur, king of Babylon, to the 18th year of Nabu-kudur-usur, king of Babylon: An accounting has been had by the parties on oath in the presence of the judges, and it was agreed that 50 shekels gold are to be received by [the first-named two parties] Nabu-bil-shunu and his father Nabu-kin-aplu. No recourse or claim will be made. The partnership-venture is dissolved, and each party will go his own way. In the name of . . . . . the gods, each party has made oath, and the accounting is finished. The original instruments executed by the parties have been cancelled."

But the Babylonian partnerships, like other such ventures elsewhere, were not always peacefully settled by

## II. *Mesopotamian Legal System*

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mutual accord; for occasionally a disputed account led to litigation. The following incomplete record (dating more than 1500 years before the above two) begins with a formal oath of the defendant to his story of the facts; and this oath is accepted by the court as decisory; the suit had been brought by the sons of one deceased partner against the son and the brother of the other deceased partner, and claimed an accounting:<sup>1</sup>

[*Partnership Lawsuit:*] “. . . . Afterwards [the defendant] Varad-shin, son of Sin-nasir, mounting the altar and touching the banner of the god Shamash, made oath against [the plaintiffs] Sin-ikisham and his brother, sons of Ubar-shamash (the brother of [the defendant's] father having already made oath), as follows:

“With the moneys appropriated from the partnership fund by my father Sin-nasir and [the plaintiffs' father] Ubar-shamash, they transacted business, after making a trading journey. Then, after the death of the plaintiffs' father Ubar-shamash, they came to my father Sin-nasir [and asked for an accounting], whereon he took from his own chest the purse of gold containing the money-proceeds of the venture, and restored it to the partnership-fund. It was not with any moneys from the partnership purse that my father bought any land or house; the house [in question] was bought with his own private assets. No other partnership moneys than the above-named in the partnership purse remained in the hands of my father Sin-nasir, nor came to my hands. Whatever private moneys were left in my father's house [on his death] were applied by me to pay his own outstanding debts.’

“Proceedings had in the Shamash Temple before six judges. . . . . After oaths taken, each party executed a document releasing all further claim.”

## 5. *Judicial Proceedings*

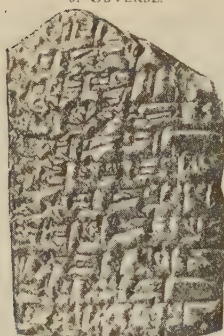
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5. There are copious documents showing a judicial system in full operation, with professional judges, professional clerks, and notaries, employing various standard forms of writs and other legal process. Among other discoveries is this judgment, dating some 2000 years B. C.,<sup>8</sup> in a suit over a boundary-wall; in this record the title is awarded to one party, and the opponent is forbidden thereafter to dispute the title.<sup>1</sup>

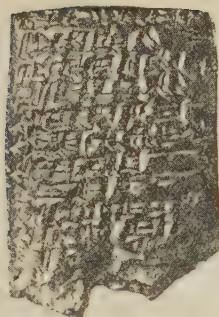
[*Judgment in a Land-Action.*] "Action claiming a wall, brought by Ibkusin, son of Sharrum-Shamash, against Waradsin. The men appointed to report inspected the wall. The distance from the wall of Nurgir to the wall of Waradsin being  $\frac{1}{2}$  rod 2 cubits [etc., etc.], the wall was proclaimed to be the property of Waradsin, in the court of Sippar at Sharrum. Forever hereafter, Ibkusin shall make no claim to this wall of Waradsin. The spirits of the gods Shamash, Aja, Marduk, and of the king Samsuiluna, are invoked. . . . [Follow the names of six witnesses to this document.]"

The king was the fountain of justice, receiving the law from divine guidance. But under King Hammurabi (about B. C. 2100) his deputized administration of justice passed from the hands of the royal priest-class, in the temples, to a body of royal secular judges, sitting commonly at the great gate and market-place of the city (as of yore also in Hebrew annals). This change was perhaps the consequence of the union of North and South Babylonia and the enactment of a common code for the united kingdom. The king continued to do justice either in person

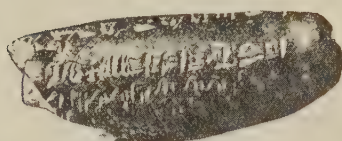
3. OBTVERSE.



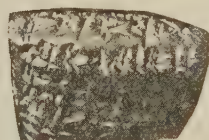
3. REVERSE



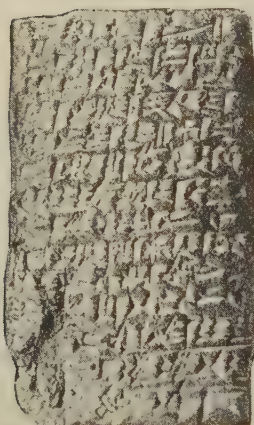
3. LEFT EDGE.



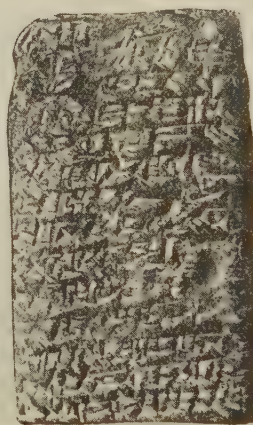
3. LOWER EDGE



4. OBTVERSE.



4. REVERSE



II. 8—JUDICIAL DECISION, B. C. 2000  
The title is awarded to one party, and the other is forbidden thereafter to dispute it

## 5. *Judicial Proceedings*

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(in some classes of cases) or through his prime minister and chief justiciary, on some principle of appeal.

But below him was a system of courts. In Babylon is found a chief magistrate (sometimes sitting with the chief magistrate of another metropolis, when the parties were of diverse domicile), and occasionally the governor of Babylon acts as judge. In the towns and villages, the mayor, presiding over a bench of elders, dispensed local justice. Clerks of courts recorded on the clay tablets a concise minute of the proceedings.

In the following record (dating about B. C. 2060) of a lawsuit over a will, it would seem that the instruments at issue, literally "contracts of heirship", were in law rather what we should call "testaments", so that the later instrument revoked and annulled the earlier one.<sup>k</sup>

[*Lawsuit over a Will:*] "An estate of 1 acre 10 rods of arable land at Bit-agargina adjacent to Ibku-adad, and 1-12 acre 25 rods of arable land, in the fields of the goddess Gula, adjacent to Iluni, were disposed of [to defendants] by Apil-ilishu, son of . . . . . who claimed title under a contract of heirship of a certain date; part of the land being sold for money, and part exchanged. [The plaintiff] Shumum-ilishi (son of Nannar-idinnam), eldest brother [of the above grantor], who claimed the land under an heirship-contract of earlier date, producing the contract, then entered complaint before the judges against Ninib-mushalim, the . . . . ., son of Nannar-tum, who had bought for money from [the above-named claimant] Apil-ilishu the plot of land at Bit-agargina, and against Sag-ninbizu, son of Ili-avele, who had received by exchange the plot of land at the Gula temple.



## II. *Mesopotamian Legal System*

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"After the judges had verified the earlier heirship-contract, the defendant [grantee] Ninib-mushalim thus pleaded in person: 'After the execution of this earlier heirship-contract produced by you the plaintiff, a later heirship-contract was executed [by the ancestor] to [the above-named] Apil-ilishu [my grantor], for the plots of land at Bit-agargina and at the Gula temple. Witnesses to this transaction are present; summon them and hear their testimony.' Thus he pleaded.

"Thereupon came forward the witnesses to the later contract, namely, Sag-ninbizu, son of Ili-avele, Su-enkiga, son of Nannar-adab, Ellitum, son of Ninib-medu, and Idin-ishtar, son of Lugal-egen. After the judges had heard their testimony to the later heirship-contract, the judges ordered them to make oath before [the god] Shamash, exalted source of all Light.

"Thereupon [the plaintiff] Shumum-ilishi voluntarily announced that he would waive these witnesses' performance of the oath before Shamash, exalted source of all Light. And because he waived the performance of the oath before Shamash, exalted source of all Light, then [the defendant] by consent of [the plaintiff] Shumum-ilishi, paid over to the said Shumum-ilishi  $1\frac{1}{2}$  shekels [in settlement of the case].

"Hereafter no claim will be made by Shumum-ilishi against Ninib-mushalim for the land at Bit-agargina, nor against Sag-ninbizu for the land at the Gula temple. Nor will Ninib-mushalim make claim against Shumum-ilishi for the  $1\frac{1}{2}$  silver shekels,

"Oath to this was made by both before the King.

"Eight witnesses . . . . . [with their signatures].

"On the 28th day of the month Elulum in the year in which King Samsu-iluna set up the two golden thrones for the shrines of Marduk and Zarpanitum."

In any of the surviving European systems, the lapse

## 5. *Judicial Proceedings*

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of a thousand years has given rise to successive new phases of thought, and thus has witnessed radical changes both in the procedural methods and in the style of the records. But in Mesopotamian annals, strangely enough, it was otherwise. After reaching a mature development by B. C. 2500 or earlier, the system exhibits little noticeable change. From the time of Hammurabi and his immediate predecessors, to the period of Darius and his immediate successors, nearly two thousand years, both method and style, as revealed in the records, seem to have remained virtually static.

The fullest extant record showing the normal course of proceedings in a lawsuit is one dating from about B. C. 2000, in the city of Babylon and the reign of Ammi-ditana; the plaintiff first apparently claims title to a piece of land; then the defendant sets up the execution of the deed; then the plaintiff rests on the allegation of non-payment of price: then the defendant joins issue on this allegation; and the court finds for the defendant, and requires the plaintiff to execute a release.<sup>1</sup>

“ . . . . . [Action for non-payment of sale-price of land, by Ilusha-negal *vs.* Addi-liblut; opening lines broken off] 1 rod of improved house-lot [being land], which Ilusha-negal, [the plaintiff,] priestess, daughter of Ea-ellazu, had bought from Belizunu, priestess of Zamama, daughter of . . . . . , in the year when King Abi-eshuh . . . . . , being 1 rod of house-lot adjacent on

## II. *Mesopotamian Legal System*

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one side to the house of Ili-ikisha son of Idin-shamash, and on the other side to the house of Ili-ikisha son of Itti-marduk-balatu, and on the front to the house of Ili-ikisha son of Idin-shamash, and on the rear to the house of Nabi-ilishu.

[*Defendant Pleads.*] “‘From the priestess Ilusha-negal daughter of Ea-ellazu, for 15 silver shekels, my wife Belizunu [a different person from the above-named B.], priestess of Marduk, and daughter of . . . . ., did indeed buy the lot in the year when King Ammi-ditana . . . . ., and I received the deeds duly executed by seal. And I have as witness Ili-ikisha above-named, possessor by inheritance of the two lots adjacent, who affixed his seal. But now the priestess Ilishu-negal, daughter of Ea-ellazu, is claiming this 1 rod of house-lot, although the executed deed bears her seal.’

[*Plaintiff Pleads.*] “‘After he had thus pleaded, the priestess Ilusha-negal, daughter of Ea-ellazu, answered thus in person: ‘When the 1 rod of improved house-lot, adjacent to 2 rods of house-lot, which I had bought from Belizunu, priestess of Zamama, was sold by me to Belizunu, [the other B.] priestess of Marduk, wife of defendant Addi-liblut, for 15 silver shekels, she did not pay me the 15 silver shekels.’ Thus the plaintiff replied.

[*Evidence.*] “‘Then the judges called upon [the plaintiff] Ilusha-negal to produce either witnesses that the [defendant] priestess Belizunu had not paid the money, or an instrument of debt for the unpaid price, but she did not produce them, for none came. Then [the defendant] Addi-liblut produced the executed deed for the 1 rod of house-lot, and the judges read it, and called for the testimony of the witnesses signing the executed deed, and they in the presence of the judges stated that the 15 shekels, the price for the 1 rod of house-lot, had been received by [the plaintiff] Ilusha-negal, and that she had acknowledged receipt.

[*Judgment.*] “‘After the judges had examined the facts, they imposed a fine on [the plaintiff] the priestess Ilusha-negal, daughter

## 5. *Judicial Proceedings*

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of Ea-ellazu, because she had denied her authentic seal; and directed that she sign the following release of claim:

[*Release.*] “‘Hereafter the 1 rod of improved house-lot, adjacent to the house of Ili-ikisha son of Idin-shamash and to the house of Ili-ikisha son of Itti-marduk-balatu and having at the front the house of Ili-ikisha son of Idin-shamash and at the rear the house of Nabi-ilishu, is the purchased property of Belizunu priestess of Marduk, wife of Addi-liblut; and Ilusha-negal, her children, her brother, and her other kin will make no claim against Belizunu and her husband Addi-liblut.’

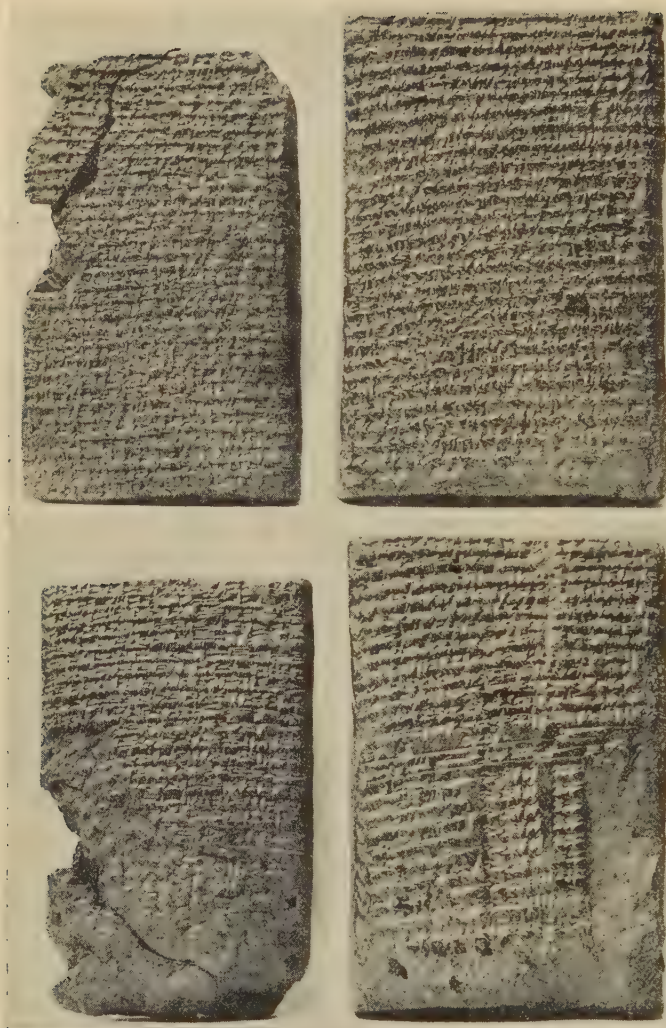
[*Certificate.*] “This they swore to by [the god] Marduk and the king Ammi-ditana, in the presence of . . . [here follow the names and titles of eight judges and a chief judge].

“Certified by Gimil-marduk, clerk of court, and Belsunu, assistant.

[*Seals.*] . . . [here follow eleven seals, first the plaintiff, then seven of the Judges, then two other persons, then the plaintiff again.]”

From the later period, about B. C. 550, we have a record of a lawsuit (perhaps an appeal) which raises points of law readily appreciable under our own modern law,—the case of Bunanitu *vs.* Akabu-ilu.<sup>10</sup> A widow sues her brother-in-law. The widow and her husband, having no children, had adopted a boy; afterwards they bought land, paying for it in part with the wife's dowry. On the husband's death, the husband's brother claimed the estate, on the ground (apparently) that the husband had died without male issue. The widow maintained that the land belonged to the adopted child and herself. The





II. 10—LAWSUIT OF BUNANITU VS. AKABU-ILU, ABOUT B. C. 630  
A widow sues her brother-in-law for land claimed  
by inheritance and obtains judgment



## 5. *Judicial Proceedings*

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court, consisting of six judges, decided in her favor. The record of this suit of Bunanitu *vs.* Akabu-ilu runs thus:<sup>m</sup>

[*Lawsuit of Bunanitu v. Akabu-ilu.*] “Bunanitu, daughter of Hariza, comes to the judges of Nabonidus, king of Babylon, and says:

[*Plaintiff's Pleading.*] “‘Bin-Addu-natan, son of Nikbata, had me to wife, receiving 3 silver mana as dowry, and I bore to him one daughter. I and Bin-Addu-natan, my husband, traded with the money of my dowry, and then with  $9\frac{1}{3}$  silver mana, including  $2\frac{1}{2}$  silver mana borrowed from Iddin-Marduk, we bought 8 rods of land, and a ruined house, in a large estate in Borsippa. We made this purchase jointly, in the fourth year of Nabonidus, king of Babylon. Now my dowry had been in the hands of Bin-Addu-natan, my husband. But I asked for it, and Bin-Addu-natan, in the kindness of his heart, deeded and entrusted to me for future maintenance the 8 rods of land and that house in Borsippa. Then in the fifth year of Nabonidus, king of Babylon, I and Bin-Addu-natan, my husband, adopted Bin-Addu-amara as our son, and executed a declaration of adoption and provided that the dowry of my daughter Nubta, when she would marry the adopted son, was to be 2 mana 10 shekels of silver and the furniture of a house. Fate then took my husband. On account of this, [his brother], Akabu-ilu, son of my father-in-law, now claims to inherit the house and everything which my husband had deeded and entrusted to me, and also claims the slave Nabu-nur-ili whom we had bought by the agent, Nabu-ahi-iddin, for money. I have brought the case to you for judgment.’

[*Judgment.*] “‘The Judges heard the parties’ statements, and examined the tablets and documents which Bunanitu produced in court. They held that Akabu-ilu [the brother] had no title to the house in Borsippa, which had been entrusted to [the wife] Bunanitu in place of her dowry; nor to the slave Nabu-nur-ili, whom she and

## II. *Mesopotamian Legal System*

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her husband had bought for silver; nor to any property of [his brother] Bin-Addu-natan. [The widow] Bunanitu and the son Bin-Addu-amara, pursuant to the terms of their tablets, are to possess them. Iddin-Marduk is to be repaid the  $2\frac{1}{2}$  silver mana which he had loaned as part of the purchase price of that house, and to discharge his claim. Then [the widow] Bunanitu is to be repaid the  $3\frac{1}{2}$  mana, her dowry. [The daughter] Nubta, besides her own property, is to have the slave Nabu-nur-ili, according to the agreement of her father.

“Judgment entered accordingly.”

Of criminal trials (as we call them; for our sharp distinction between criminal and civil cases is not found in the Oriental systems, nor in the early stages of any system) no satisfactory records have yet been deciphered. But interesting sidelights on criminal justice are occasionally revealed in the copious annals of lay literature.<sup>11</sup> The human aspect of the processes of justice in domestic contentions may be seen in this petition from an accused person, in which he beseeches the king's personal attention to right his wrongs and vindicate his reputation:<sup>12</sup>

[*Appeal of an Accused.*] “To the King my Lord thy servant Nebo-Balatzu-ikbi sends greeting. May the gods Nebo and Marduk to the King my Lord be propitious! and may the god . . . . who is the head of heaven and earth prolong thy life!

“Have I not once and twice besought the King my Lord? Yet no one has sent to me news from Babylonia. Is the countenance of the King turned away from me? and have I committed some crime against the King my Lord? No! I have not committed any crime against the King my Lord.





II. 11—AUDIENCE HALL AT NINEVEH

"A certain man, my accuser, entered the palace boldly; a criminal charge against me he raised; fetters on my hands he placed"

## 5. *Judicial Proceedings*

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"When trustworthy witnesses had assembled and I had declared my fidelity to the King before a public notary, a certain man, my accuser, entered the palace boldly; a criminal charge against me he raised; fetters on my hands he placed, and said: 'In the presence of all these people who are here assembled, as prisoner of my Lord the King, I arrest you!' All that day I lay flat on my face upon my bed. The soldiers who passed by my bed, out of ill-will, none gave me food for my mouth; hunger and emptiness fell upon me. When evening came, I rose up, and I muffled my fetters, and I passed by in front of the guard whom the King my Lord had set in that place to guard it. How I was liberated I will now tell the King. Some soldiers, strangers to me, came in thither, who broke off from me the King's fetters, and with idle words spoke against the King (the King will understand me). For two days, for money, to sustain my life they brought me of their food, for my portion, and for my nourishment, and they spoke words of disrespect against the King my Lord, that are not decorous that the King my Lord should know them; their full speech I conceal, for it were not meet for the eyes of the King. (Sarludaru will tell me the will of the King.) Moreover, a certain villain of the land of Sumir, who never broke my bread, this man seduced the daughter of Babilai, who is the son of one of the Priests of the Sun. To the King my Lord I wrote word of the crime, and one at a time, the magistrate and the prosecuting officer took it by turns to adjudicate, for the King on purpose had mingled them so, to judge my household; they sent writings in multitudes, letter after letter.

"When Sarludaru to the office of Exchequer Judge had been appointed, the prosecuting officer demanded judgment, and having thrown the men of my household into prison, he gave them to Sarludaru. When he came to judge, he said: 'Fear not, my man! Needlessly thou fearest.' And I till the time of the evening meal continued talking with him. Meanwhile, the girl had been carried off; but how she left the house I saw not; I heard not; and I knew not



## *II. Mesopotamian Legal System*

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who carried her off, not in the least! for in the crowd of servants of the King my Lord, with whom she had been talking, she had remained behind. O Marduk! whoever has concealed her flight, I have as yet obtained no news of him, but, O Lord of Kings! I will urge with haste the search for her present dwelling-place. The prosecuting officer has annulled the criminal accusation; but that the King [himself] should judge all my family from my heart I desire!"

6. The legislation of Babylonia has already been found, in large part. One of the earliest peoples occupying Babylonia was the Sumerians, a non-Semitic people; and a few years ago an American scholar discovered and deciphered a fragment of one of their primitive enactments.<sup>12</sup> It is inscribed on a clay tablet  $1\frac{1}{2}$  feet square, and dates from possibly 2400 years B. C. The characters of this inscription have therefore the solemn impressiveness of being the oldest code-text in the world yet discovered.

Its added interest is that it happens to contain, among its seven paragraphs, the rule which explains the parable of the Prodigal Son, told by Jesus of Nazareth to a Semitic people more than two thousand years later: "And the younger son said to his father, 'Father, give me the portion of goods that falleth to me'. And the father divided unto them his estate. And not many days after, the younger son gathered all together, and took his journey into a foreign land.'" Now this act of partition, as the Sumerian Code shows, was no more than the lawful



II. 12—SUMERIAN CODE  
The oldest code-text in the world, yet discovered

## II. Mesopotamian Legal System

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proceeding of emancipation, as a comparison of its text will illustrate:°

*Sumerian Code, par. 4*

"If a son says to his father and his mother, 'Thou art not my father nor my mother', he shall abandon the house, field, plantation, and other property, but his own full portion shall be delivered to him by his father. His father and his mother shall say to him, 'Thou art not our son'; and he shall go out from the place."

*Parable of the Prodigal Son  
(Luke, XV, 11)*

"And the younger son said to his father, 'Father, give me the portion of goods that falleth to me'. And the father divided unto them his estate. And not many days after, the younger son gathered all together and took his journey into a far country."

For, in the Sumerian Code, a son may say to his parents, "Thou art no longer my father nor my mother", and the father must then deliver to him his portion of the estate. This made the son independent, but forever cut him off from further share in the home. In the parable, indeed, his father ultimately bestows on him the fatted calf. And the profound moral there is the subordination of strict legal right to the justice of the heart.

But the greatest treasure of Babylonian law is the Code of Hammurabi.<sup>13</sup> In this system, as in the Egyptian and the Hebrew, the Law is conceived as delivered to the King from a Divine hand. The sun-god Shamash, seated on the right, is the god of Law, whose children are Justice and Right. And the king, Hammurabi, receiving



II. 13—PILLAR-CODE OF HAMMURABI

It is 8 feet high, and contains some 300 sections; a portion at the base is missing



## II. *Mesopotamian Legal System*

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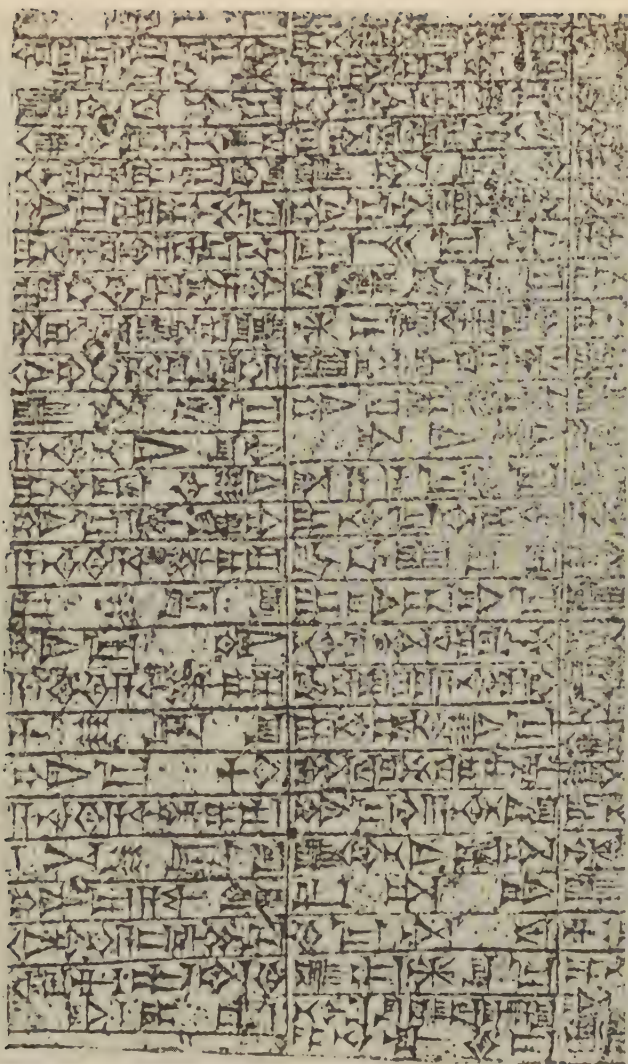
the law from Shamash, declares that he the king has kept the strong from oppressing the weak, and has given safety to the orphan and the widow; and so, to do justice in deciding lawsuits, the king has inscribed the Law publicly, where all may come and read it, at the temple-gate of the Sun-God Shamash, where justice is dispensed.

Such is the epilogue to the famous Pillar-Code of King Hammurabi, discovered in 1902. It is eight feet high, and contains some three hundred sections. It dates about B. C. 2100. The original is in the Louvre Museum; a facsimile can be seen in Northwestern University School of Law. It is the earliest national code in the world whose (almost) full text we know, being some 1500 years older than the Hebrew Code and the Hindu Code of Manu. Its provisions have been transcribed in cuneiform type,<sup>14</sup> and translated into several modern languages. They range over nearly the whole scope of law,—crime, family, property, commerce.

These following passages will serve to illustrate their style:<sup>p</sup>

[*Hammurabi Code.*] “If a man have borrowed money of a merchant, and have given (as security) to the merchant a field to be planted with grain and sesame, and have said to him, ‘Cultivate the field and reap and take for thyself the grain and sesame which is in the field,’ and if the cultivator have raised grain and sesame in the field, at the time of reaping the owner of the field shall receive the





II. 14—TRANSCRIPTION OF A PART OF THE PILLAR-CODE OF HAMMURABI

## *II. Mesopotamian Legal System*

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grain and sesame which is in the field, and he shall give to the merchant grain for the loan which he had received and for the interest and for the maintenance of the cultivator.

“If he give (as security) a field planted with grain, or a field planted with sesame, the owner of the field shall receive the grain or the sesame which is in the field, and he shall return the loan and its interest to the merchant.

“If he have not money to return, he shall give to the merchant grain or sesame at their market value as fixed by the king, for the loan and its interest, which he has obtained from the merchant . . . .

“If a man have borrowed money from a merchant, and his creditor had warned him to pay; and he had nought to give, and he had given over his garden already cultivated, and then had said, ‘All the dates, which are produced in this garden, take for thy money,’ that merchant shall not assent. The dates, which are produced in the garden, only the possessor of the garden may take; then shall he pay the merchant the money, including the interest, in accordance with his account, and the remaining dates, which are produced in the garden, shall the possessor of the garden take . . . .”

For tracing the evolution of law, the value of this Babylonian Code is incalculable; because about 1920 the discovery of another partial code (the Code of Assur), dating from the later times of Assyrian domination in Mesopotamia, about a thousand years after Hammurabi, enables us now for the first time to compare on a large scale different epochs of Semitic law. And since the full legal records of the Hebrews, another Semitic people, though more primitive, date some 500 years still later, the parallel comparison of institutions in these three adjacent

## 6. *Legislation*

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peoples is bound to illuminate the problems of legal evolution. For example, in Egypt, as we saw, the wife might by contract reserve the sole right of divorce; but in these three Semitic codes, only the husband could divorce; moreover, by the Code of Hammurabi, in the passage here shown, the husband on divorce is bound to restore to the wife her dowry; yet, by the Code of Assur, he may give her only as much as he pleases; while the Hebrew law says nothing of any payment by the husband:<sup>a</sup>

CODE OF HAMMURABI  
*Sect. 138*

"If a man would put away his wife who has not borne him children, he shall give her money to the amount of her marriage settlement, and he shall make good to her the dowry which she brought from her father's house, and then he may put her away."

CODE OF ASSUR  
*Col. I, Sect. 38*

"If a man puts away his wife, he shall give her something if he wishes to; if he does not wish to, he shall not give her anything; she shall go empty out of his house."

DEUTERONOMY  
*Ch. XXIV, Verse 1*

"When a man hath taken a wife and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement and give it in her hand, and send her out of his house."

7. The glories of the Babylonian kingdom made it long pre-eminent among neighboring peoples; the famous Hanging Gardens of Babylon were the theme of amazed contemporary visitors, whose reports are no longer deemed incredible. But the very riches of Babylon marked it as an

## *II. Mesopotamian Legal System*

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object of prize for the young sturdy nations on the east now surging down from the mountains towards Mesopotamia. And it came to pass, some 1500 years after Hammurabi's day, about B. C. 550, when the Hebrew people were now captive in Babylon (the great judge Daniel among them), that the Babylonian King, Nabunahid (as the Babylonian records call him), or Belshazzar (as the book of Daniel names him), gave a feast, and the mysterious hand came and wrote upon the wall. And Belshazzar's thoughts were troubled, and his knees smote one against another, and he cried aloud to his wise men; but they could not interpret the writing; and then was Daniel brought in to read it. The fourth word of the handwriting on the wall, interpreted by Daniel at Belshazzar's Feast, was this: "Peres: Thy kingdom is divided, and given to the Medes and Persians." And "in that night", says the chronicle, "was Belshazzar the king of the Chaldeans slain."

Belshazzar was the last native ruler of Babylonia. He lost his empire to Cyrus, king of the new Persian nation, Aryans by race, coming from the east. Other new invading races followed; and by a century before Christ, under the Greek conquerors, the Babylonian legal system was supplanted. Hammurabi's pillar-code, and the vast

## 7. *Fall of Babylon*

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storehouses of legal records, were gradually buried under the rubble of ages; until, some 2000 years still later, another Aryan, this time coming from the west, a French explorer, DeMorgan, chanced upon the pillar-code and bore it away in triumph to the Louvre Museum,—the greatest prize of the century for the revelation of legal history.



## II. Mesopotamian Legal System

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### Sources of Illustrations

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## II. Mesopotamian Legal System

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THE  
HEBREW  
LEGAL SYSTEM



### III

#### *The Hebrew Legal System*

Shifting home of early Hebrews—Five stages of the legal system.

1. *Mosaic Period*—The Ten Commandments—Hebrew and Greek texts—Deuteronomy—Moses delegates justice to professional judges—Solomon—Absalom doing justice at the Gate—Solomon's judgment between the two mothers.
2. *Classic Period*—The Sanhedrin—The rabbi—The Temple—Loss of Hebrew political independence.
3. *Talmudic Period*—The Talmud—Development of law by precedents—Debates of the rabbi—Jesus debating in the Temple.
4. *Medieval Period*—Maimonides—Exchequer of the Jews—Commercial instruments—Marriage-contracts.
5. *Modern Period*—A Hebrew Code—Reading the Torah.



III. 1—MAP OF PALESTINE

### III

## The Hebrew Legal System



THE early Hebrew civilization was originally nomadic and pastoral, then agricultural, and only later commercial. Its home shifted, at various epochs, from Arabia to Egypt, then to Palestine, then to Babylon, then to Palestine again.<sup>1</sup>

It represented a much simpler and less advanced stage than its neighbors and older Semitic relatives, the Mesopotamians. But the contiguity of their territories linked their destinies in tribal struggles, for many centuries. Both in Egypt and in Babylon the Hebrew tribes sojourned for long periods as a subject people. About B. C. 2100 the patriarch Abraham saw King Hammurabi, as an enemy in battle. Nearly a thousand years later the leader Moses, with his brother Aaron, appeared in the court of Pharaoh (perhaps the great king Rameses II, B. C. 1300), and Aaron, it is recorded, cast down his rod before Pharaoh and it became a serpent; this was the first miracle by which Moses hoped to soften Pharaoh's heart, and free the Hebrews from their bondage. And it was some six hundred years still later that the great Hebrew judge Daniel, when a captive in Babylonia, must often have looked upon the code-pillar of Hammurabi, which at that time still stood on the acropolis of Susa.



### *III. Hebrew Legal System*

In Daniel's time, Hebrew legal history was still in its first stage; for the Hebrew legal system developed in five well-defined stages:

#### CHART OF PERIODS OF HEBREW LAW

|                                          |                                                                                                                                                                    |                                                                                                       |                                                                                                                                            |
|------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
|                                          |                                                                                                                                                                    |                                                                                                       | About<br>B. C. 1200                                                                                                                        |
| 1. MOSAIC<br>PERIOD                      | <div style="display: inline-block; vertical-align: middle;"> Moses<br/>David<br/>Solomon<br/>Elijah<br/>Daniel<br/>Josiah<br/>Ezekiel<br/>Nehemiah<br/>Ezra </div> | Narratives<br>and<br>Codes                                                                            | <div style="display: inline-block; vertical-align: middle;"> "Genesis"<br/>"Exodus"<br/>"Leviticus"<br/>"Numbers"<br/>"Deuteronomy" </div> |
|                                          |                                                                                                                                                                    |                                                                                                       | B. C. 400                                                                                                                                  |
| 2. CLASSIC<br>PERIOD                     |                                                                                                                                                                    | <div style="display: inline-block; vertical-align: middle;"> Reports of Cases<br/>Commentaries </div> | <div style="display: inline-block; vertical-align: middle;"> B. C. 300<br/>A. D. 100 </div>                                                |
| 3. TALMUDIC<br>PERIOD                    | Digests                                                                                                                                                            | <div style="display: inline-block; vertical-align: middle;"> The "Mischna"<br/>The "Gemara" </div>    | <div style="display: inline-block; vertical-align: middle;"> A. D. 200<br/>A. D. 500 </div>                                                |
| <i>[DISPERSION OF THE HEBREW PEOPLE]</i> |                                                                                                                                                                    |                                                                                                       |                                                                                                                                            |
| 4. MEDIEVAL<br>PERIOD                    |                                                                                                                                                                    | <div style="display: inline-block; vertical-align: middle;"> Private Codes<br/>Commentaries </div>    | <div style="display: inline-block; vertical-align: middle;"> A. D. 700<br/>A. D. 1500 </div>                                               |
| 5. MODERN<br>PERIOD                      |                                                                                                                                                                    | <div style="display: inline-block; vertical-align: middle;"> Translations<br/>Printed Editions </div> | <div style="display: inline-block; vertical-align: middle;"> A. D. 1600<br/>A. D. 1900 </div>                                              |

First came the Mosaic period, to B. C. 300, including the kings, the prophets, and the judges; then, the classic period, when the rabbi developed the law; then the

## 1. *Mosaic Period*

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Talmud period, when the records were consolidated; then the medieval and the modern periods. Strictly as a system of law, it ended with the second stage, A. D. 100, at the replacement of Jewish law in Palestine by Roman rule; after that, it became mainly local custom, chiefly in ceremonial and moral rules.

1. In the first, or Mosaic period, comes the Pentateuch, or Five Books; and to the summit of Mount Sinai, in Arabia, the lofty pinnacle five thousand feet high from the plains below, Moses is said to have gone up to receive from Jehovah the Two Tables of the Law. On his first return, bearing the tables writ with the Divine finger, he found that the people of Israel had been fickle and had set up a golden calf to worship it, and Moses' anger waxed hot and he cast the tables out of his hands and brake them. But at Moses' prayer, Jehovah forgave the people and again wrote the Law upon Two Tables like the first, and Moses came down again from the mountain, and his face shone with light so that the people were afraid.

These Ten Commandments, on the two tablets of stone, were the greatest short moral code ever formulated, and are still far in advance of Humanity's and even Christianity's daily life:<sup>a</sup>

[*The Ten Commandments.*] "I. Thou shalt have none other gods before me.

### *III. Hebrew Legal System*

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"II. Thou shalt not make thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the waters beneath the earth: Thou shalt not bow down thyself unto them, nor serve them; for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me, and showing mercy unto thousands of them that love me, and keep my commandments.

"III. Thou shalt not take the name of the Lord thy God in vain: for the Lord will not hold him guiltless that taketh his name in vain.

"IV. Keep the sabbath-day to sanctify it, as the Lord thy God hath commanded thee. Six days thou shalt labour, and do all thy work: But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work,—thou, nor thy son, nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thine ox, nor thine ass, nor any of thy cattle, nor thy stranger that is within thy gates; that thy man-servant and thy maid-servant may rest as well as thou. And remember that thou wast a servant in the land of Egypt, and that the Lord thy God brought thee out thence through a mighty hand and by a stretched out arm; therefore the Lord thy God commanded thee to keep the sabbath-day.

"V. Honour thy father and thy mother, as the Lord thy God hath commanded thee; that thy days may be prolonged, and that it may go well with thee, in the land which the Lord thy God giveth thee.

"VI. Thou shalt not kill.

"VII. Neither shalt thou commit adultery.

"VIII. Neither shalt thou steal.

"IX. Neither shalt thou bear false witness against thy neighbour.

## 1. *Mosaic Period*

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"X. Neither shalt thou desire thy neighbour's wife, neither shalt thou covet thy neighbour's house, his field, or his man-servant, or his maid-servant, his ox, or his ass, or any thing that is thy neighbour's.

"These words the Lord spake unto all your assembly in the mount out of the midst of the fire, of the cloud, and of the thick darkness, with a great voice: and he added no more. And he wrote them in two tables of stone, and delivered them unto me."

The five books of the Pentateuch were known as the Torah, or Ancient Law. But modern research tells us that these texts of the Pentateuch were only gradually built up during some eight centuries of development. The earlier parts were probably inscribed in Aramaic, an alphabetic form of Assyrian. Towards the close of this first period, when most of them had accumulated, they were rendered into a language known as Square or New Hebrew; but the earliest extant example of this style of script dates from about A. D. 100. Finally, they were put into Greek, by the scholars of Alexandria, about B. C. 250.; the law-book Deuteronomy has one of the oldest texts in this script now surviving; it dates from A. D. 400 or 500;<sup>3</sup> the following is an illustrative passage:<sup>b</sup>

"When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife. And if the latter husband hate her, and write her a bill

ΘΟΥΣΑΓΕΝΗΤΑΙΝ  
 ΑΡΙΣΤΕΡΩ· ΚΑΙ ΜΙ  
 ΟΙΣ ΕΝ ΑΥΤΗΝΙΟΔΩΤ  
 Ο ΕΣΧΑΤΟ· ΚΑΙ ΠΡΑ  
 ΨΕΙΔΥΤΗ ΕΒΛΙΟΝ  
 ΑΠΟΣΤΑΣΙΟΥ ΚΑΙ ΑΣ  
 ΣΕΙΣ ΕΙΣ ΤΑ ΧΕΙΡΑ  
 ΑΥΤΗΣ· ΚΑΙ ΕΞ ΑΠΟ  
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 ΟΗΚΕΙ ΑΣ ΑΥΤΟΥΝ Α  
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 ΤΑΙ ΑΜΗΝ ΥΜΙΝ· ΨΥ  
 ΑΛΕΣ ΟΑΙ ΠΟΙΕΙΝ

III. 3—THE BOOK OF DEUTERONOMY, IN GREEK SCRIPT  
 The Pentateuch was put into Greek about B. C. 250, at Alexandria,  
 the metropolis of learning; but the oldest extant manuscripts  
 are some seven centuries later.



## 1. *Mosaic Period*

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of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die, which took her to be his wife; her former husband, which sent her away, may not take her again to be his wife, after that she is defiled; for that is abomination before the Lord: and thou shalt not cause the land to sin, which the Lord thy God giveth thee for an inheritance."

During this period, as the tribal population multiplied and political life became more complex, the transition took place from the personal justice of the tribal leader to an organized hierarchy of local courts. It is thus recorded (as if it had been done at a single instant) in the traditions of the book of Exodus:

"And it came to pass on the morrow that Moses sat to judge the people: and the people stood by Moses from the morning unto the evening. And when Moses' father-in-law [Jethro] saw all that he did to the people, he said, 'What is this thing that thou doest to the people? Why sittest thou thyself alone, and all the people stand by thee from morning unto even?' And Moses said unto his father-in-law, 'Because the people come unto me to inquire of God. When they have a matter, they come unto me, and I judge between one and another; and I do make them know the statutes of God, and his laws.'

"And Moses' father-in-law said unto him, 'The thing that thou doest is not good. Thou wilt surely wear away, both thou and this people that is with thee: for this thing is too heavy for thee; thou art not able to perform it thyself alone. Hearken now unto my voice, I will give thee counsel, and God shall be with thee: Be thou for the people to God-ward, that thou mayest bring the cause unto God; and thou shalt teach them ordinances and laws, and shalt show them the way wherein they must walk, and the work that they must do. Moreover, thou shalt provide, out of all the people,

### III. Hebrew Legal System

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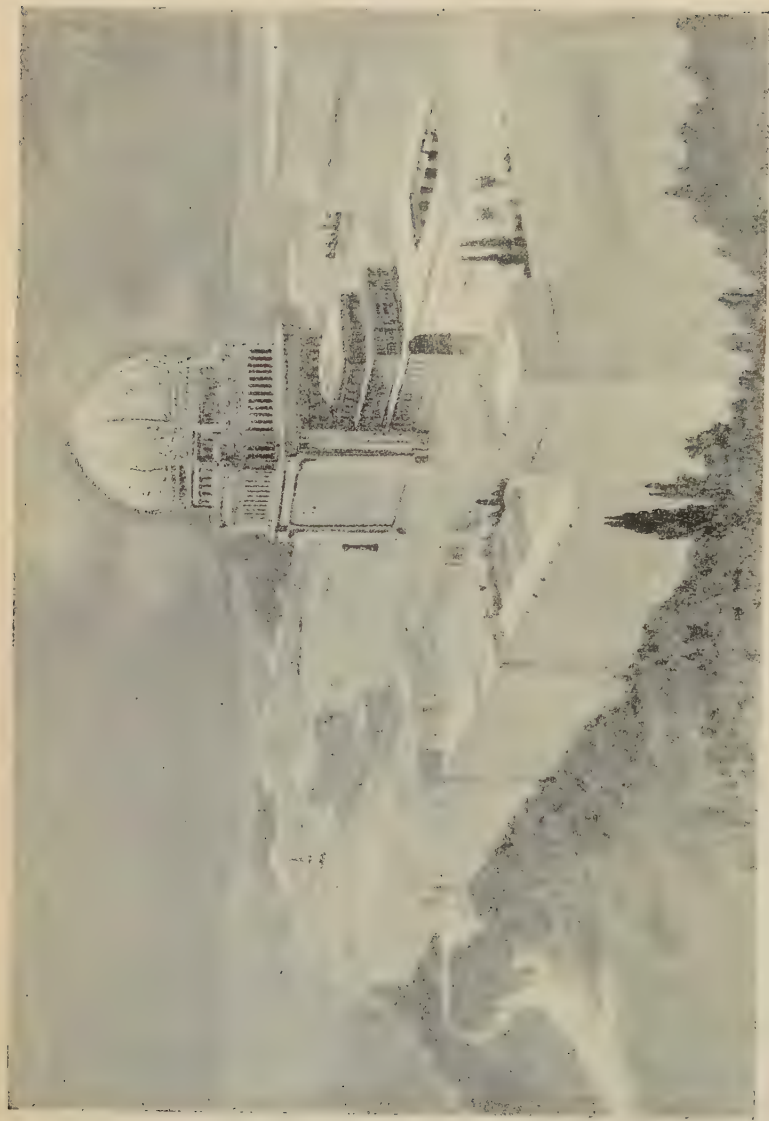
able men, such as fear God, men of truth, hating covetousness; and place such over them to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens; and let them judge the people at all seasons. And it shall be, that every great matter they shall bring unto thee, but every small matter they shall judge. So shall it be easier for thyself; and they shall bear the burden with thee. If thou shalt do this thing, and God command thee so, then thou shalt be able to endure, and all this people shall also go to their place in peace.'

"So Moses hearkened to the voice of his father-in-law, and did all that he had said. And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves."

The judges thus deputed were members of the priestly class; in this respect the measure contrasts with the stage of a secular judiciary long before reached in Babylonia in King Hammurabi's time (*ante*, Chap. II). But the change was momentous to the future of Judaism; for it signified that this particular group of primitive Semite tribes were now developing a legal system, by the activities of a professional class.

It is in this first, or Mosaic, period of splendor that the famous Temple-palaces were built.<sup>4</sup> Within the Temple enclosure was enacted the whole legal drama of the Hebrew people. The Great Sanhedrin (or, Synhedrion), the Supreme Assembly of Elders, held its political trials of





III. 4—TEMPLE-PALACE OF SOLOMON

Within this enclosure was enacted the whole legal drama of the Hebrew people

## 1. *Mosaic Period*

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Jeremiah and other leaders in the Court of the Great Temple. The Hebrew King did justice, as with other earlier peoples, at the Temple Gate or the Palace Gate; and we read in the Book of Samuel<sup>c</sup> that when Absalom sought seditiously to undermine the authority of his father, King David, he went and sat at the Gate; and when any man, that had a controversy, came for the king's judgment, Absalom would say to him, "Oh, that *I* were made judge in the land, that every man which hath any suit might come unto *me*, and *I* would do him justice!" And so, says the chronicle, "Absalom stole the hearts of the men of Israel".

Solomon, the son of David, in all his glory, became famous in his day as a royal builder; his date is about B. C. 900. But Solomon the royal Judge, as a sage skilled in human nature, made his name for all time a synonym for judicial wisdom. For God had appeared to the young King Solomon in a dream,<sup>d</sup> and bade him ask any gift; and Solomon asked the gift of an understanding heart, to judge his people, that he might discern between good and bad. And God gave him such wisdom as no man before ever had, and his fame was in all nations round about. And there were two women who lived together and had each a babe, and one babe died, and its mother exchanged it secretly for the living one, and they disputed for the



### III. Hebrew Legal System

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living one before Solomon, and he said, "Take a sword, divide the living child in two, half for each." And the false mother said, "So be it". But the true mother said, "Nay, nay, do not slay the child, but give it to her!"<sup>5</sup> And Solomon's wisdom thus discovered the true mother, and the people saw "that the wisdom of God was in him, to do judgment".<sup>6</sup>

2. The second, or Classic, law-period is formed by the legal practice developing between B. C. 300 and A. D. 200.

The government was in theory still a theocracy, i. e. divine command inspiring the rulers. The Jewish historian Josephus, writing towards the end of this period, thus philosophizes:<sup>f</sup>

"Some legislators have permitted their governments to be under monarchies, others put them under oligarchies, and others under a republican form. But our Legislator had no regard to any of these forms, but ordained our government to be what (by a strained expression may be termed) a Theocracy, by ascribing the authority and the power to God . . . . And where shall we find a better or more righteous constitution than ours? This makes us esteem God to be the governor of the universe, and *permits the priests in general to be the administrators of the principal affairs*, and withal intrusts the government over the other priests to the chief high priest himself . . . . These men had the main care of the law and of the other parts of the people's conduct committed to them; for they were the priests who were ordained to be inspectors of all, and the judges in doubtful cases, and the punishers of those that were condemned to suffer punishment."



III. 5—SOLOMON'S JUDGMENT BETWEEN THE MOTHERS

"And the king said: 'Divide the living child in two, and give half to the one and half to the other.'  
Then spake the woman whose the living child was, 'O my lord! give her the  
living child, and in no wise slay it!'"



## 2. *Classic Period*

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By this period the function of justice had ceased to be a royal one. The Jewish people came now successively under the suzerainty of Persian, Greek, and Roman rulers; but in their internal government the supreme authority—religious, social, and political; legislative and judiciary—was vested in a Senate, known finally under the name Great Synhedrion. (This was a Greek term, meaning “assembly,” hebraicized as “sanhedrin”; the native Hebrew term was “Bet din hagadol”, or, “high council”, “high court”.) It consisted of seventy-one members, and its most frequent activity was that of a Supreme Court. Under it were two intermediate synhedrions in Jerusalem, and others in the larger cities. Each lesser synhedrion consisted of twenty-three members. Beneath them all were village courts of three members. The synhedrion of twenty-three members sat in a semi-circle, and in front of each member sat three of his chosen disciples, making three lower semi-circles. Each judge thus had three juniors to assist him, and when a vacancy occurred the place was taken by the junior next in line. Thus the courts were recruited by a system of apprenticeship and promotion from the lower to the higher.

And the supply of recruits was furnished by the numerous schools of religious law; those aspirants who

### *III. Hebrew Legal System*

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graduated and were ordained as masters ("rabbi") became eligible for election to a synhedrion.<sup>6</sup> The most famous of these schools is said to have had twelve hundred students. The Jewish judge could lawfully follow



III. 6—A DOCTOR OF THE LAW

any other occupation on the days when the court was not in session; and some of the most eminent were principals of these schools of law. Thus there was a constant contact between the courts and the schools. Indeed, the schools were the preservers of the law to posterity; for although there were clerks attached to every synhedrion,







III. 7—JESUS IN THE TEMPLE WITH THE DOCTORS OF LAW

“After three days they found him in the Temple, sitting in the midst of the doctors of law, both hearing them and asking them questions,”

## 2. *Classic Period*

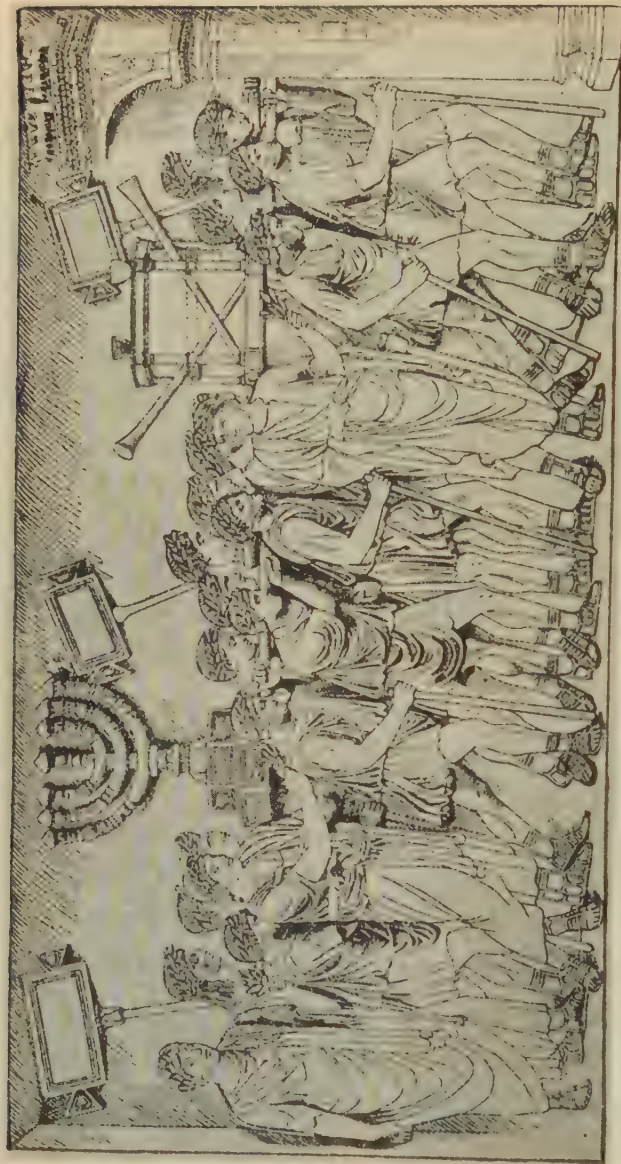
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no records of the judgments, directly made, have come down to us. The copious rules and decisions, elaborated during this period, are known only through the reports of discussions in the schools, long carried in memory (extraordinary as this seems) and reduced to writing in a later period.

Jesus first attracted notice by his precocious display of learning and wisdom in his arguments of law with the rabbi;<sup>7</sup> for when his parents, going home from Jerusalem, discovered that their boy of twelve years had been left behind, they turned back anxiously, and after three days they found him in the temple, sitting in the midst of the doctors of law, both hearing them and asking them questions.

Under the Roman sovereignty, which here intervened, the Jewish people for two centuries preserved the administration of their own law, in the main. The ruler Herod was still termed king; and at the inner Court of the Temple at Jerusalem a stone known as Herod's Pillar, inscribed in Greek and Latin, was the symbol of this independence; it warned intruders of the death penalty for any Gentile who entered the holy spot.

But the convulsive political rebellions of the Jews, after the time of Jesus, led the Roman Emperor Vespasian to take rigorous revenge. Jerusalem fell, under the as-



III. 8—TITUS' ARCH: SCULPTURE SHOWING THE ARK CAPTURED  
The Roman soldiers carried into Rome the Ark, containing the  
Scroll of the Law, the Seven-Branched Candlestick,  
and the Silver Trumpets

### 3. *Talmudic Period*

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saults of Titus, son of Vespasian, in A. D. 70. And the soldiers carried away to Rome the sacred Ark of the Law,<sup>8</sup> containing the Scroll of the Law, and the Seven-Branched Candlestick, as part of the spoils in Titus' triumphal procession. The Hebrew general was cast headlong from the Tarpeian Rock, pursuant to ancient Roman custom with a vanquished people. Hebrew self-government ended; and their legal-system, as such, ceased to prevail.

3. The third period, the Talmudic, from A. D. 200 to A. D. 500 is formed by the Talmud, i. e. reports of all recorded cases and commentators since about B. C. 300, digested in two authoritative collections,—the Mishnah, or codified text, compiled about A. D. 200, in New Hebrew script, and the Gemara, or commentary, about A. D. 300-500, compiled in Aramaic script.

No systems, except the Roman, the Mohammedan, and the Anglican, have surpassed or equalled the Hebrew in emphasizing development by reasoning based on case law, and in preserving the fame of individual jurists and judges and the annals of their decisions. The names of nearly one hundred rabbis are mentioned in the Talmud as the authors of decisions; and many more must have contributed. The most famous, in the compilation of the Talmud, was Rabbi Hillel, a contemporary of Jesus of Nazareth, and president of the Great Synhedrion. He



# ברכות מ הלמוד בבלי

עין ג' דעם רש"י. תוספות. ותוספות יצנים. ומסקן תוספות. רבינו אשר. קעוד פסקן  
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## III. 9—THE TALMUD

The Talmud is an immense cyclopedia, ranging over history, mathematics, medicine, theology, and metaphysics, as well as law

### 3. *Talmudic Period*

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first organized the vast mass of materials. A great successor, Rabbi Akiba, in the 2d century A. D., improved the system. And then Rabbi Judah, at the close of the century, gave final form to the collection, known thenceforth as Mishnah, or "learning". It contains sixty-three concise treatises. During the next three centuries copious discussion in the schools centred around the text of the Mishnah. At Jerusalem, about A. D. 300, a digest of these discussions was made; and at Babylon (another and even greater Jewish center), about A. D. 500, another collection was made; these were known as the Gemara (or, "Commentaries"). The Mishnah and the Gemara together form the Talmud.<sup>9</sup>

The Talmud is an immense cyclopedia, ranging over history, mathematics, medicine, theology, and metaphysics, as well as law. For the law, it serves as the copious record of elaborate arguments and decisions on rules and cases adjudged by the doctors of the law.

The style of reasoning is illustrated in the following passage on the subject of Bailments:<sup>5</sup>

[*The Talmud.*] "*Mishnah*, V: All special artificers are considered bailees for hire. If, however, they have notified the owners that the work is ready and they may take it, and the payment should be made thereafter, they are considered from that time gratuitous bailees. If one says: 'Guard for me this article, and I will guard yours,' the depositary is considered a bailee for hire. If

### III. Hebrew Legal System

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one says: 'Guard for me this article,' and the depositary answers: 'Leave it with me,' he is a gratuitous bailee. If one has lent money on a pledge, he is considered a bailee for hire. R. Jehudah, however, said that if he has lent him money on a pledge (without interest) he is considered a gratuitous bailee; if, however, he has lent fruit on the pledge, he is considered a bailee for hire . . . . .

*"Gemara: . . . . . 'If, however, they have notified,' etc.* There is a Mishna (in Chapter VIII of this tract): 'If the borrower told the lender to send through a messenger, and he did so, he is responsible for an accident; and the same is the case when he returns it in that way.' . . . . .

"Huna Mar b. Mrimar, in the presence of Rabina, raised a contradiction between the two Mishnas mentioned above, and afterwards explained them as follows: In our Mishna it is stated: If they said, 'Take yours,' etc., they are considered from that time bailees for hire; and the same is the case if they have notified the owners that the work is ready for them. Is it not a contradiction from the above-cited Mishna that if the borrower told him to send, etc., he is responsible? (Hence we see that it is considered under the control of the borrower even when he returned it, and this contradicts the statement in our Mishna, which is, that as soon as the specialist has notified the owner of the article that it is ready for delivery it is considered under the control of the owner.) And he himself answered that Raphram b. Papa said, in the name of R. Hisda, that the cited Mishna treats of when the borrower has returned the loan through his messenger before the agreed time has elapsed (consequently it was under his control unquestionably); but if he did so after the elapse of the agreed time, he is free.

"The schoolmen propounded a question: What is meant by the expression 'free'? Is it meant free of the responsibility of a borrower (who is responsible for an accident also), but that he is still responsible as a bailee for hire (who must pay for theft and loss), or does it mean entirely free from any charge? Said Amimar:

### 3. Talmudic Period

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It seems that he is free only from the responsibility of a borrower, but not from the responsibility of a bailee for hire; as he has derived benefit from it, he is considered such . . . . .

“‘Guard for me,’ etc. Why so? Is this not to be considered a guard in the presence of the owner? . . . . .

“The rabbis taught: If one say: ‘Guard for me this article, and I will guard yours to-morrow; or, lend me, and I will lend you’; ‘guard for me, and I will lend you’, or vice versa, all are considered bailees for hire, one to the other.

“There were sellers of spices who agreed that each one of them should be engaged one day in each week in preparing food for the whole company. One day they said to one of their number: ‘Go and bake bread for us’, and he replied: ‘Then guard for me my garment.’ They, however, neglected to do so, and the garment was stolen; and when the case came before R. Papa, he made them responsible. Said the rabbis to R. Papa: Why should they be responsible? Was not the neglect in the presence of the owner? And he was embarrassed. Finally it was learned that at the time the garment was stolen its owner was not occupied in baking, but was drinking beer (consequently the decision of R. Papa was a just one). But why was R. Papa embarrassed? There is a different opinion between the Tanaim in such a case. According to one, he is free; and according to the other, he is not. Could not R. Papa say that he agreed with the latter? The case was, the day on which he was told to bake for the company was not the day appointed for him, and he was asked to do this as a favor. He, however, says: ‘For this favor you will favor me by guarding my garment,’ and it was not owing to wilful neglect that it was stolen. And R. Papa made them responsible according to the law of a bailee for hire; and the rabbis told him that the company ought not to be held responsible, because of the law concerning a guard in the presence of the owner, to which all agree that there is no responsibility, and

### III. Hebrew Legal System

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therefore he was embarrassed; but finally it was learned that his decision was correct as stated above.

“There were two men on the road; one was tall and the other was short. The tall man was riding an ass, and with him an ironed sheet for a covering, and the short one was covered with a cloak (a woolen one). When they came to cross a stream, the short man placed his cloak upon the ass, and instead of it took the sheet of the tall man and wrapped himself up in it, and the water carried it away. When the case came before Rabha he made him responsible. Said the rabbis to Rabha: Why should he be responsible? Was it not in the presence of his owner (i. e., at the same time the sheet was lost, the lender was crossing the stream with the borrower's cloak; is this not equal to the case, ‘guard my article, and I will do so with yours,’ of which it is said above that if it was at the same time there is no responsibility)? And Rabha was embarrassed. Finally, it was learned that the short man took it without the consent of his comrade, and he also placed his cloak upon the ass without consent . . . . .

“*On a pledge, he is a bailee for hire,*’ etc. Our Mishna is not in accordance with R. Eliezer of the following Boraitha: ‘If one lends money on a pledge, and the pledge was lost, he may take an oath that there was no wilful neglect in guarding it, and collect his money from the borrower; so is the decree of R. Eliezer.’ R. Aqiba, however, maintains the defendant may claim, ‘You have lent me the money only on this pledge, and as the pledge is lost, so is your money.’ But if he lends a thousand zuz on a note, and also added a pledge, then all agree that he loses his money in case the pledge is lost (as then the pledge is not for any other purpose than to collect the money from it in case of default; otherwise the note would be sufficient even from an encumbered estate. Hence we see that R. Eliezer considers the possessor of the pledge a gratuitous bailee, contrary to our Mishna)”.







III. 10—A TREATISE OF MAIMONIDES, MS. OF ABOUT A. D. 1440

### 3. *Talmudic Period*

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III. 10a—MAIMONIDES, CHIEF JURIST OF THE MIDDLE AGES

4. The fourth, or medieval, period of Hebrew law begins at the dispersion of the Jewish nation, which culminated about A. D. 500 and extended over the next thousand years. In this period learned rabbi wrote treatises (in Hebrew or Arabic), compiled codes, and thus perpetuated the traditions of the law. One of the most famous was Maimonides,<sup>10a</sup> who lived in North Africa in the 1100's, and wrote numerous works.<sup>10</sup> By this means the common customs of religious and family life and commercial practice were kept alive, though the race was scattered in many countries.

### III. *Hebrew Legal System*

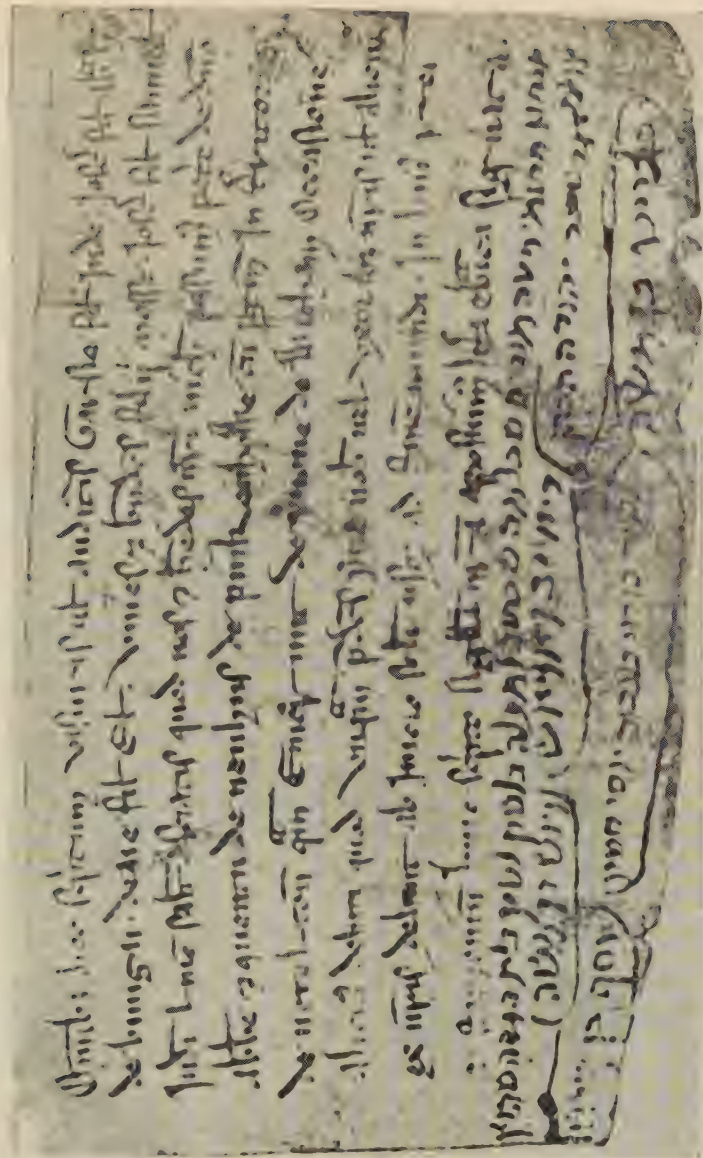
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In England, after the Norman conquest, large numbers of Jews came over from the Continent. Beginning about A. D. 1200, and lasting until their expulsion a century later, a special status was given to the Jewish communities by the English kings in two royal charters. One of these charters provided that civil disputes in which Jews alone were concerned should be left to their own tribunals:<sup>h</sup>

[*Charter for Jewish Civil Justice.*] "John by the Grace of God, etc. Know that we have granted and by our present charter confirmed to our Jews in England that the breaches of right that shall occur among them, except such as pertain to our Crown and Justice, as touching homicide [etc.] . . . . be examined and amended among themselves according to their Law, so that they may administer their own justice among themselves".

But no records of this Jewish justice appear to be extant.

The other charter provided for suits between Christians and Jews, and prescribed the procedure and mode of proof. For such suits a special tribunal was created—a branch of the Exchequer Court, "*Scaccarium Judeorum*". Now the Jews, debarred from most other occupations, made their living chiefly as lenders of money; hence, money-claims founded on bonds<sup>11</sup> were a principal subject of this litigation; and the Crown, for the better protection of the creditors (as well as in its own interest



## III. 11—SHETAR (DEED) OF A. D. 1236

The Jewish term for deed or bond was "shetar". In this one, the upper part is in Latin, the lower part in Hebrew



### III. Hebrew Legal System

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as a tax-gatherer), established "archives", or registries of bonds, in which the instrument must be recorded, in order to be valid.

The Englishman's bond, or contract, was made out in the usual form of English practice, thus:<sup>1</sup>

[*English Debtor's Bond to a Jew.*] "Know all men present and future that I William son of Ralph of Hetheby owe to Jacob son of Jacob a Jew two marks of silver to be repaid on the octave of St. Michael in the 44th year of the reign of King Henry son of King John, and unless I shall so repay I shall give to him every week two pence per pound interest as long as I am bound by the said debt, and thereto I have pledged to him all my lands and chattels. Done Wednesday after Palm Sunday of the said year."

But when the Jewish creditor assigned or released the debt, he made out the instrument in the form to which he was accustomed in dealings with his own people, thus:<sup>2</sup>

[*Jewish Creditor's Release.*] "Aaron son of Abraham acknowledged by his starr that he quitclaimed and pardoned to Robert de Mares and his heirs and assigns all the manor of Akemere which he bought of John de Mares brother of the said Robert; so that neither he nor his heirs can demand or claim aught upon the said manor with its appurtenances by reason of any debt which the said John owed him from the creation of the world to the end."

The Jewish term for deed, or bond, was "shetar" or "starr", from the Hebrew "starra" (memorial). It was sometimes written in Hebrew with a Latin translation, sometimes in Latin alone, sometimes in Latin with Hebrew characters.<sup>11</sup> This term "starr" is supposed by

#### 4. *Medieval Period*

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some scholars (but with little ground) to have given rise to the famous name "star-chamber", on the theory that these Jewish starrs were once preserved in that room.

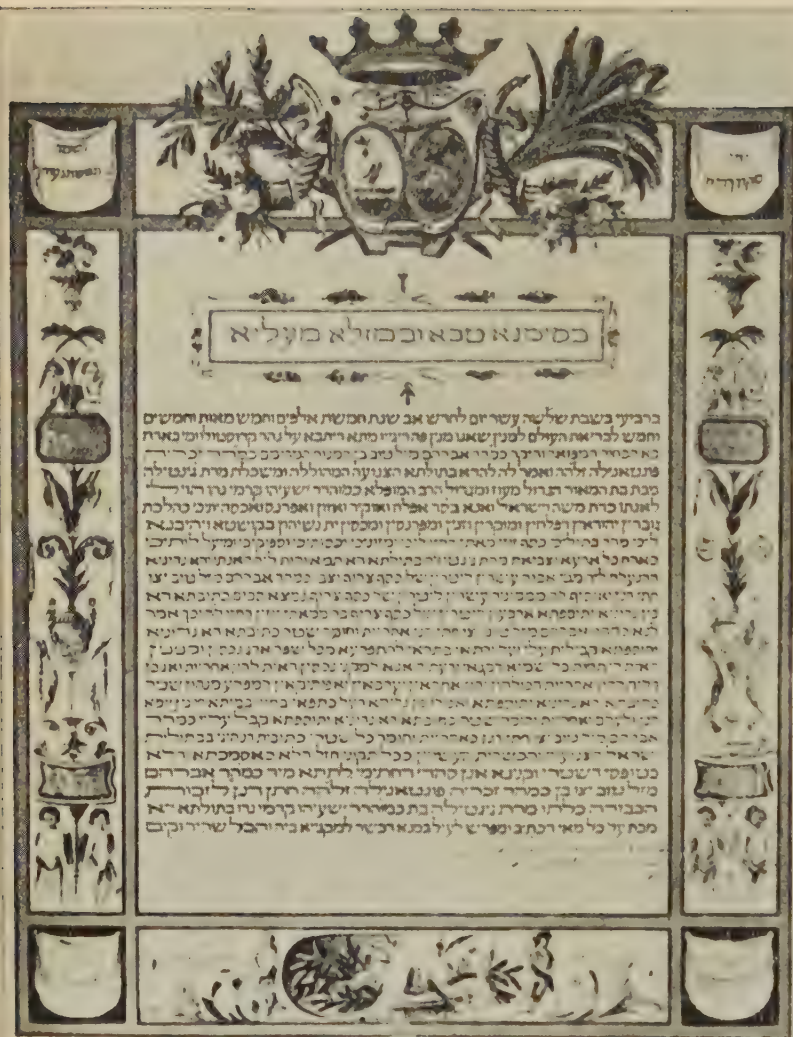
The Jews in those days lived their family life largely by their own rules; for the Jewish communities were often compelled by political prejudice to reside in segregated areas of city or country. A highly decorated marriage-contract from the eighteenth century<sup>12</sup> illustrates how they developed their own legal forms for transactions, especially in family affairs, such as inheritance and marriage.

Many of these customs are surviving today. For the modern certificate of marriage, there is a printed form of 1915, published in New York.<sup>13</sup> It reads as follows:

[*Certificate of Marriage, A. D. 1915.*] "On the 5th day of the week, 15th day of the month of Nisson, year 5680 since the creation of the world.

"Be it known that the bridegroom Jacob, son of Abram, said to the maiden Sarah daughter of Solomon, 'Be thou my wife according to the law of Moses and of Israel, and I will labor to support thee honorably and to nourish thee, according to the custom of Jewish men who labor for the honorable maintenance and support of their wives, and I grant thee as nuptial gift the price of thy maidenhood, two hundred zuzin, due thee according to the law of Moses. I am also to provide thee with food, raiment, and all necessities, also to visit thee after the manner of the world'.

"Thereupon the said maiden consented to become his wife and brought unto him the dowry given to her by her family, consisting of [enumerating the articles] ...



II. 12—MARRIAGE-CONTRACT, A. D. 1795





### *III. Hebrew Legal System*

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"And the aforesaid bridegroom said, 'By virtue of this document I hereby accept responsibility for the integrity of this dowry, and of my addition thereto, for myself and my heirs, . . . all of my property I pledge as security for the payment of the sum set forth above, and I even pledge the very cloak on my shoulders, this security to continue during my life and after that, from this day forth forever.' . . .

"We [the undersigned marriage-go-betweens] have purchased the right of this man, namely the bridegroom, and have vested it in this worthy woman, namely this maiden, entitling her to all that is above set forth, by a token with which the right has been duly purchased. And this certifies that the agreement is valid and binding."

5. And this brings us to the fifth and last period in the history of the Jewish legal system. From A. D. 1600, nationalism in Europe began to amalgamate all races who lived within given territories, and to emphasize national languages; so the Hebrew language became only a secondary one for Jews. During this period the Talmud was critically studied and translated into the various national languages. In New York, in 1915, Rabbi Kadushin has even produced a new modern Hebrew Code in English.

But even today, the Scroll of the Law<sup>14</sup>, known as the Torah, or precepts of Moses, fixed on two staves and unrolled from right to left in ancient fashion, is preserved in every synagogue; and the Ark of the Law, standing at the altar of the Synagogue, is thus the most important treasure in the Sanctuary, because it contains this the





III 14—THE SCROLL OF THE LAW

### *III. Hebrew Legal System*

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Jew's most precious possession, the Torah. And as in the days of old, it is recorded that the good king Josiah, when the lost book of the Law was found, went up into the temple with all the people of Jerusalem, both small and great, and read in their ears all the words of the book of the covenant,—so, still today, on the Sabbath the Torah is solemnly read aloud in every part of the land. And the clan-instinct of a few zealous elders, worshippers of Israel's past, ignoring the manifest destiny of modern law to be territorial, and forgetting the anachronism of the primitive rabbinical rules, still vainly strives to perpetuate the tribal Code of Moses amongst American institutions.

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4. *Temple Palace of Solomon*. From the reproduction of the painting by *W. H. Lippincott*, in *H. H. Bancroft's* "Book of Wealth", section I (cited ante, chap. II).
5. *Solomon's Judgment*. From the reproduction of the painting by *Robert Leinweber*, in the series "Die Heilige Schrift" (cited *supra*), ser. 1, No. V.
6. *Doctor of the Law*. From a reproduction by *Newton & Co.*, London, of a drawing by *Eugene Burnand*.
7. *Jesus Arguing with the Doctors*. From a reproduction of the painting by *Heinrich Hoffmann* in the Dresden Gallery.
8. *Titus' Arch*. From a restoration of the sculpture on the arch.
9. *Talmud Text*. From the facsimile of the title-page of the Wilna edition of the Babylonian Talmud in *Michael L. Rodkinson*, "The Talmud" (translated), vol. X, p. 54 (New York, New Talmud Publishing Co., 1897-1903; now owned by the George Coleman Publishing Co., Boston).
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11. *Shetar of A. D. 1236*. From a facsimile in the "Jewish Cyclopaedia", vol. XI, p. 286, of the original in the British Museum.
12. *Marriage-Contract, A. D. 1795*. From a facsimile, in the "Jewish Cyclopaedia", vol. III, p. 128, of the original in the New York Public Library.
13. *Certificate of Marriage, A. D. 1915*. From an original form furnished and translated by *Israel Isaac Himmelstein, Esq.*, of the Chicago Bar, and printed by the Hebrew Publishing Co. (New York, 1915).
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- b. *Deuteronomy*, Greek Script. This contains vv. 1-4 of C. XXIV.
- c. *Samuel*, XV, 2-6.
- d. *Solomon's Dream*, I Kings, III, 5.  
*Solomon's administration of justice is reputed to have been efficient: "Judah and Israel dwelt safely every man under his vine and under his fig-tree, from Dan even unto Beersheba, all the days of Solomon" (I Kings, IV, 25).*
- e. *Solomon's Judgment*, I Kings, III, 16-23. For citations of similar anecdotes attributed to wise judges in other Oriental systems, see *post*, Chap. VIII, Note f.
- f. *Josephus Passage*. From "*Works of Flavius Josephus*", ed. Whiston, vol. II, pp. 512, 514 (2 vols., Phila. 1829).
- g. Talmud passage; from the book *Baba Metzia*, part II, ch. VI, as translated in *Rodkinson* (cited *supra*), vol. VI, p. 201.
- h, i, j. *Charter, Bond, and Starr*, in *England*. From *J. M. Riggs*, "Select Pleas", etc. (cited *infra*), pp. XIV, 2, 11.

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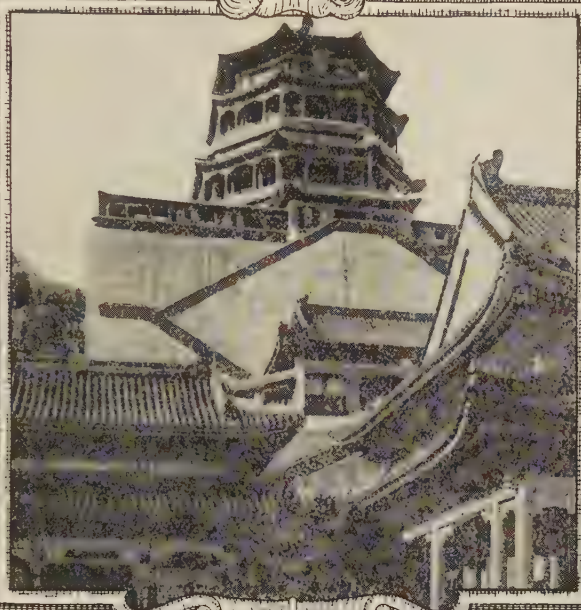


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See also, for Syria and Egypt, the citations under Chap. IX (Mohammedan Legal System).



THE  
CHINESE  
LEGAL SYSTEM



## IV

### *The Chinese Legal System*

#### *(I) Political Principles*

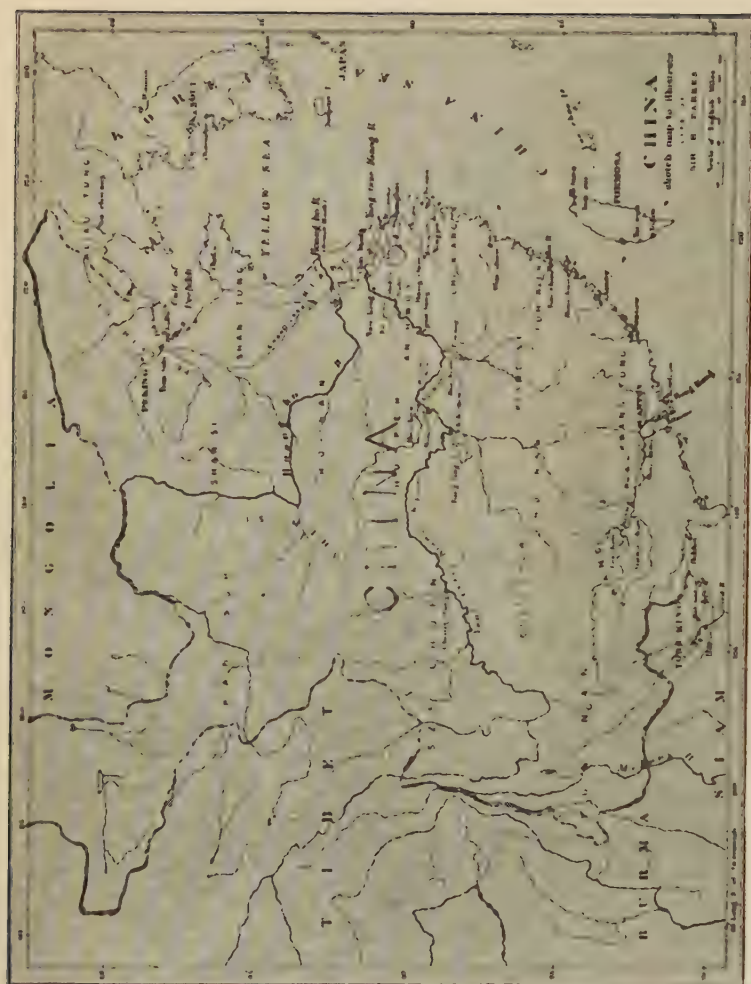
1. The third oldest system, and the only surviving old one—Conservatism and filial piety—Confucius' political philosophy.
2. Philosophy of justice.
3. A government of men, not laws—Absolute governors, responsible for producing popular contentment.
4. Conciliation before litigation.
5. Legislation based on popular custom and sentiment.
6. The laws penal in form.
7. Practical justice; the testimony of Perera the Portuguese.

#### *(II) The Old Legal System*

8. Early codes—the "Burning of the Books"—Tsing Code of A. D. 1650—Lu and Li—Texts on Adoption and on Mortgage.
9. Conveyancing—Mortgage deed of 1870—Registration of land-titles.
10. Court procedure.
11. Appellate justice—Precedents—Supreme Court opinions of A. D. 1827 and 1831 on adoption and marriage—Record of a trial for manslaughter in A. D. 1808.
12. Law-treatises—Imperial edicts—Judicial rescript — Legislative decree — Edict on stone.

#### *(III) The New Legal System*

13. Revolution of 1912—Constitution of 1923—New codes—New Supreme Court decisions.
14. Durability of China's institutions.



IV. 1—MAP OF CHINA



## IV

# The Chinese Legal System



THE third earliest legal system of the world, in origin, is the Chinese, beginning in history before B. C. 2500. Its unique distinction is that it is the only old one that has survived continuously to date—a period of more than 4000 years; in comparison, the other living systems of today are but children.

Through the centuries the Chinese nation absorbed several waves of conquest from the North;<sup>1</sup> and the massive gates and walls which still protect their great cities are a relic of the military struggles of the late Middle Ages. And it must be remembered that the Chinese themselves are a totally different race-stock from their successive conquerors, the Turanian Mongols, Tartars and Manchus.

### (I) POLITICAL PRINCIPLES

1. The sturdy survival of the Chinese as a people is due largely to their strong clan and family structure, which is equalled only by the Semites (the Chinese law, for example, recognizes one hundred and one degrees of relationship), and to their consequent conservatism, which by some observers has been miscalled “stagnation”. In the grove of trees near his home,<sup>2</sup> Confucius expatiated to his disciples upon the ancestral customs. “I”, he said,

## IV. Chinese Legal System

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IV. 2—CONFUCIUS AND HIS DISCIPLES STUDYING THE PRECEDENTS

"am a transmitter and not a maker; for I trust and admire the men of former times". "Filial piety is the root of all good conduct. What is filial piety? It is the skilful carrying out of the wishes of our forefathers."

Confucius' philosophy, which is not a religion, but covers the whole range of personal morality and practical politics, has now pervaded Chinese life (in spite of the inroads of rival systems) for 2400 years. It rests on a passionate yet rational respect for those conventions which the experience of the past has verified. Confucius, one of the world's wisest men, was a chief justice about B. C. 500. He left only one grandson, but several thousand of his descendants are now living, and form the only hereditary aristocracy in China. Confucius was born in Kufu, in the province of Shantung; but spent his life in



至聖孔子像



IV. 3—CONFUCIUS

## 2. *Philosophy of Justice*

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many provinces as a statesman, a philosopher, and a judge,—uniting in one man the careers of a Jefferson, an Emerson, and a Marshall.<sup>3</sup> One of his sayings has a deathless truth for us: “As a judge”, he said, “I decide disputes, for that is my duty; but the best thing that could happen would be to eliminate the causes for litigation!”

2. The history and characteristics of the Chinese system of law and justice cannot be appreciated without taking into account the general philosophy of life that underlies it. In the following passage, a modern legal scholar lucidly summarizes that philosophy and points out some of its effects on ideas of law and justice:<sup>a</sup>

“Since the dawn of its history, China has believed in the existence of a natural order of things, or law of Nature, including all parts of the universe and adjusting them harmoniously with one another. This order of Nature was not made; it exists and is its own reason for existence. Humanity is a part of it, and must conform to it. And as the elements in this order of Nature are interdependent, whatever affects one element reacts on the others also. . . .

“The consequences of this theory in the field of government and of justice may be readily perceived; here are the most important:

“This natural law does not yield precedence to positive law, i. e. laws representing human experience and wisdom. Positive law ought to confine itself to translating the natural law into written formulas. If this translation is correct, the written law is good and binding; if the translation is incorrect, i. e. if the prince or the governor in formulating his decrees has misinterpreted the law of



#### *IV. Chinese Legal System*

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nature, the written law is not binding. A Chinese will regard as binding a rule promulgated even by doubtful constitutional authority if he deems it conformable to 'the edicts from on High'; and he will deem himself free to disregard it if he finds it in disaccord with the natural law. The notion will not occur to him that the same act can be permissible or forbidden, good or bad, just or unjust, independently of its intrinsic moral quality and solely because the holder of political power has so labelled it. Thus the almost religious respect for positive law, marking our Occidental civilizations of Greco-Roman origin, does not exist in China.

"A consequence is that the positive law is observed only so far as it has received the effective assent of the community, i. e. has been consecrated by custom. . . .

"Furthermore, if we ask how one can determine in advance whether a rule of conduct will receive this popular sanction, it must be said that no exact answer can be given, because the Confucian philosophers never formulated or defined the natural law even in its broad lines; but that in general the Chinese look to Moderation, Humanity, Equity, as the governing idea for social relations. The conception of strict logical law, independent of the purpose in hand and the personality of the parties to a dispute, remains an alien notion. The Chinese does not conceive of an absolute right or wrong in law.

"It follows that in general, he seeks a middle road, the golden mean, a compromise which will 'save the face', an adjustment by settlement between the differing contentions. The magistrate, for the Chinese, is a friendly arbitrator, rather than a dominating authority bound to declare the law and to secure its respect. In the current practice of the interior districts, a court decision in a civil case is executed only when the losing party signifies his acceptance of it; for it would be contrary to natural law to use compulsion on a free mind.

### 3. *Men, Not Laws*

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"And finally, since positive law is the expression of natural law, its violation, even of rules purely civil (as we should say), will involve at the same time a penal sanction, for it will be a breach of the preëxisting order of nature,—a transgression liable to cause dangerous disturbance in the community."

This philosophy of life, then, so different from the Occidental, leads to some special traits underlying all law and justice:

3. A marked contrast of the Confucian political philosophy with Occidental systems is that its fundamental maxim is emphatically "a government of *men*, not laws", the reverse of our own maxim; for the Chinese philosophy of government is that a good ruler makes a happy people:<sup>b</sup> "The Master said 'Let there be Men, and Government will flourish. But without the right men, government decays. Therefore the success of government lies in getting proper men. If you *lead* the people correctly, who will dare not to be correct? Hence the *institutions* of a ruler are rooted in his own character and conduct'". Thus Chinese political science relies on the wisdom and discretion of the ruler rather than on the text of laws.

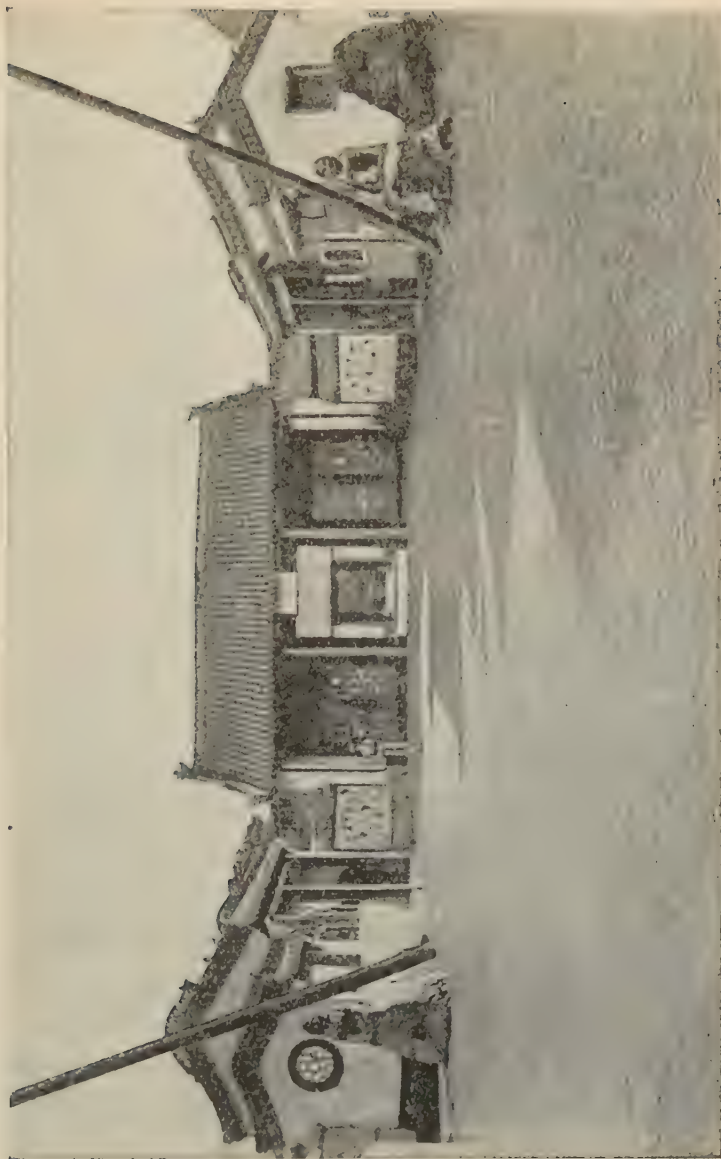
It is indeed true that in the centuries just after Confucius (B. C. 400-200) a school of philosophers arose—known as the Legists—who repudiated entirely the doctrine of a government of men, in favor of the doctrine

#### *IV. Chinese Legal System*

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of a government of laws; their expositions are powerfully reasoned, and would make good reading with us today. Under the Chin and the Han dynasties (about B. C. 200), for a century or so, this philosophy obtained the upper hand, and was effectively practised by able statesmen of that era. But its dominance was brief. It was but a passing episode. The Confucian principle, congenial as it is to the racial Chinese nature, was soon once more enthroned in Chinese government, and firmly maintained that place during the next two thousand years.

As a logical consequence, there was but a single official directly ruling each province or locality; and his yamen, or office,<sup>4</sup> was the all-inclusive center of local administration. The magistrate, or governor, had *all* authority,—dispensing justice, collecting taxes, officiating as political executive, as chief priest, and as moral guide and censor. In his judicial duties, he was of course assisted by a staff of clerks and advisers, learned in law and procedure. The governor was responsible to the Emperor at Peking, for maintaining law and order, and for keeping the people contented and prosperous, and was judged solely by results. Should he fail to find and punish the guilty person in a notorious murder or robbery, he was almost certain to be removed from office. Should a rebellion break out and be left unsuppressed, he was dis-



IV. 4—A GOVERNOR'S YAMEN, OR OFFICIAL HEADQUARTERS

The magistrate, or governor, had *all* authority,—dispensing justice, collecting taxes, and officiating as political executive, chief priest, and moral guide and censor

## *IV. Chinese Legal System*

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graced for life, and might even be forced to suicide by the fatal silken cord sent him for the purpose from the Emperor. But while he lived and was governor, his authority was sole and absolute, over millions of people. The idea of one-man rule was second nature with the Chinese people; so that when the ambassadors of the Dutch Republic visited Peking in A. D. 1795, their hosts expressed astonishment on hearing that there existed such a political monstrosity as a "republic". The Chinese governor was in his way a master-mind, a comprehensive man of the world,—a unique character, not paralleled in any other legal system.<sup>5</sup>



IV. 5—A GOVERNOR

4. Another notable consequence of the Confucian philosophy (or Chinese character) is that conciliation and mutual adjustment are looked upon as ideal elements of justice. "As a judge," said Con-



#### 4. Conciliation

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fucius, "I decide disputes, for that is my duty; but the best thing would be to eliminate the causes for litigation". The German jurist Puchta has concisely stated the antithesis between justice and law:

"The relationships of law are the relations of one man to another, and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of law, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man. There must, therefore, occur much modification and subtraction before we reach the special relations which alone are involved in the idea of a law. Thus, suppose a man has arisen from a protracted illness, and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to his recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor, whom he has helped in former times, and obtains a loan at the usual rate. How much of all this must we not leave out in order to ascertain the purely jural relations between the parties! Compare with this the case of the rich man who borrows capital merely to add to his possession by a new speculation, and consider the effort of abstraction which is required in order to assimilate the resulting legal relations. And yet the *legal* relations in these two cases are identical."

To the Anglo-Norman lawyer, accustomed to do homage to strict legal principle as in and for itself the "summum bonum" of law, and to regard legal justice as manifesting itself only in a system of unbending rules, this quotation will indicate better than anything else the great gulf that is fixed between his own system and that which was indigenous to China. By making generalizations into

#### *IV. Chinese Legal System*

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hard-and-fast rules, by strictly eliminating in individual cases a variety of important moral considerations, the Anglo-Normans have succeeded in creating a special type of justice. This tendency of theirs is so strong that English Equity, the one great effort to counteract it, has become in the end identical in these respects with the whole system.

Yet there are peoples to whom this type of justice is utterly alien. The "struggle for rights", which the great German jurist, von Ihering, inculcated as the basis of civic law and order, is alien to Chinese thought. An unyielding insistence upon principle, and a rigid demand for one's due, are almost as reprehensible as a vulgar physical struggle. Moral force, and the "rule of reason", should control, rather than strict technical rights. Compromise is the highest virtue; intolerance and obstinacy, a mark of defective character. Nothing is so important that it cannot be compromised for human welfare or comfort or dignity. Hence the significance (so misunderstood by the Occidental) of "saving the face", i. e. of obtaining a respectable compromise in a dispute. Hence, also, the universal resort to mediation or arbitration, precedent to going to law, and usually removing that necessity.<sup>c</sup>

5. Related to this is another marked feature of China's legal system—the subordinate part played by the

## 5. *Public Opinion*

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letter of the law, and by legislation as such. The ruler should frame the laws to voice the best sentiments and wants of the people,—not to impose his personal will upon an unwilling people; else there can be no contentment. Confucius said: “When a prince loves what the people love and hates what the people hate, then he is what is called ‘the parent of the people’.” The imperial authority, though nominally supreme, is powerless to oppose national habits of thought. Thus, the mere enactment of a law, and the mere letter of its text, are in themselves not vital. The law should reflect custom and public opinion. If a local governor finds or introduces a commendable usage, he may send an account of it to the ministry at Peking; the minister submits it to the supreme council, and if approved, it is notified to the other provinces. If another governor accepts, it can become law there at once; if it is generally accepted elsewhere, it is put into the code, but does not necessarily become strict law until it is generally familiar. This is the “rule of reason” applied to legislation.

Thus the political system of personal discretion and one-man rule—from emperor down to magistrate—is apparent only. It would mislead the Occidental student who did not realize that every important official act or measure is in fact more or less controlled, indirectly, by

#### IV. Chinese Legal System

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public opinion. The strike, the boycott, even the riot, may become the extreme but normal indices of this opinion. As a most experienced observer has summed it up: "The Chinese are the most law-abiding people on the face of the globe—but the laws by which they will abide must be laws of which they approve." In 1927, Mr. Ku Hung-Ming, one of China's "elder statesmen," on being asked about democracy for China, thus replied: "It has been well said that the best form of democracy for China is a despotism tempered with the rights of the people."

6. Still another consequence of the general principle is that the code of imperial laws (apart from the purely administrative organization) is in form a penal code. There is no formal distinction between criminal and civil law; almost every chapter or section ends with a statement of the penalty for its violation. All private 'rights' (as we call them) have a public interest, in that their violation may lead to brawling and injustice and public discontent, and may therefore be repressed by penalties. This principle rests on the still broader truth that there is no distinct line between morality and law. If a rule has become so settled and obvious that it has arrived at a place in the code, it *ought* morally to be obeyed by all; and the few who may resist must naturally be coerced by a penalty; they merit it.

## 6. *Penal Laws*

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It can be understood, from the foregoing traits, that the general body of formal legislation does not play the same part, in the legal system at large, as in the Occident. The law was to be a ready instrument in the hands of benevolent and experienced rulers. It might be expanded or modified to suit a higher sense of equity. In such a system of government one half of the success was to depend upon the skill and justice of the individual official, and the other half upon the detailed provisions of the laws.

7. Nevertheless, it cannot be doubted that (as in ancient Greece, where for different reasons an analogous condition is found) the Chinese system was one of effective law and order. All observers, since the earliest records, describe the Chinese people as notably law-abiding and peaceful. A Portuguese writer at Macao, about A. D. 1590, declared, "It is a world to see in what equability and indifferency of justice all of the Chinese do live their lives, and how orderly the public laws are administered". Sir George Staunton, the British diplomat who translated the Code of Tsing, in pronouncing upon "some positive moral and political advantages" of the Chinese constitution, attributes these advantages "lastly, to a system of penal laws, if not the most just and equitable, at least the most comprehensive, uniform, and suited to the

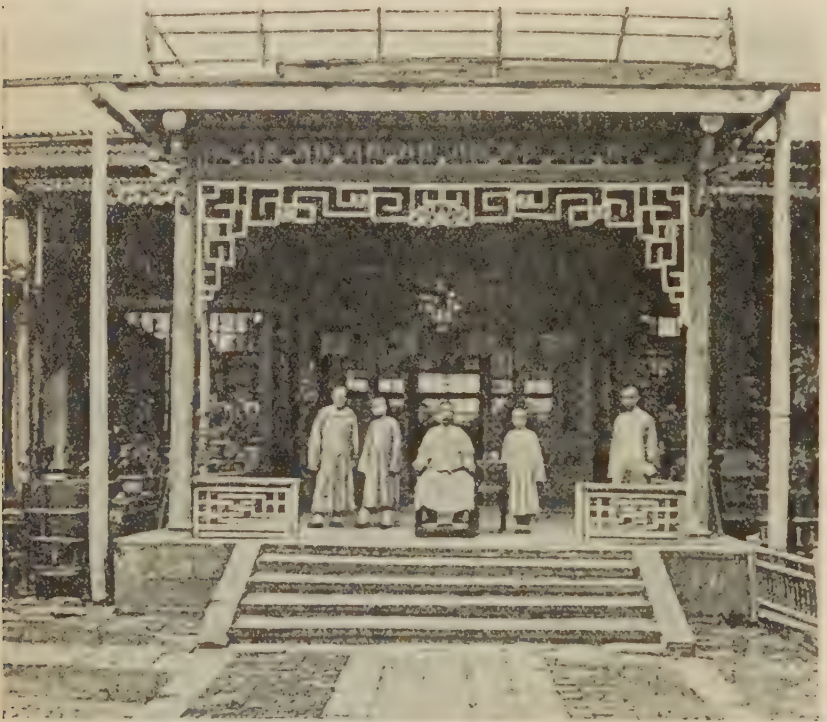


#### *IV. Chinese Legal System*

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genius of the people for whom it is designed, perhaps of any that ever existed."

That the dispensation of justice under this system, in spite of its peculiarities, may merit comparison with other systems in its methods and results, is amply testified to by the verdict of foreign observers in all periods.<sup>6</sup> An Arab traveler of A. D. 850, the first eye-witness to leave a



IV. 6—A COURT-HOUSE

## 7. *Practical Justice*

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record, says that the Chinese “administer justice with great strictness in all their tribunals.” A striking instance is one chronicled by Perera, the Portuguese merchant, in Macao about A. D. 1560. Perera’s party had been mistaken for pirates; were arrested; resisted; and some Chinese deaths resulted. The strangers were then charged, first with piracy, and secondly with resisting officers. But their true character was vindicated at the trial; the officers who unjustly arrested them as pirates were disgraced; and the individuals who had done the killing were found guilty of homicide. Perera thus comments on the kind of justice his party received:<sup>d</sup>

[*A Foreigner’s Experience as Accused in a Chinese Court.*] . “I shall have occasion to speake of a certaine order of gentlemen that are called Louteas. I wil first therefore expound what this word signifieth. Loutea is as much to say in our language ‘Sir’ . . . . . Such Louteas as doe serve their prince in weightie matters for justice, are created after trial made of their learning. . . . . Now will I speake of the maner which the Chineans doe observe in doing of justice, that it may be knowen how farre these Gentiles do herein exceed many Christians, that be more bounden then they to deale justly and in trueth . . . . . In the principall Cities of the shires be foure chiefe Louteas, before whom are brought all matters of the inferiour Townes, throughout the whole Realme. Divers other Louteas have the managing of justice. . . . . These Louteas do use great diligence in the apprehending of theeves, so that it is a wonder to see a theefe escape away in any City, Towne or village. . . . .

“The Louteas observe moreover this: when any man is brought

#### *IV. Chinese Legal System*

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before them to be examined, they aske him openly in the hearing of as many as be present, be the offence never so great; thus did they also behave themselves with us. For this cause amongst them can there be no false witsnesse, as dayly amongst us it falleth out. This good commeth thereof, that many being alwayes about the Judge to heare the evidence, and beare witsnesse, the processe cannot be falsified, as it happeneth sometimes with us . . . . . Againe, these Louteas, as great as they be, notwithstanding the multitude of Notaries they have, not trusting any others, do write all great processes and matters of importance themselves. Moreover one vertue they have worthy of great praise, and that is, being men so wel regarded and accompted as though they were princes, yet they be patient above measure in giving audience. We poore strangers brought before them might say what we would, as all to be lyes and fallaces that they did write, ne did we stand before them with the usuall ceremonies of that Countrey; yet did they beare with us so patiently, that they caused us to wonder, knowing specially how litle any advocate or Judge is wont in our Countrey to beare with us. For wheresoever in any Towne of Christendome should be accused unknowen men as we were, I know not what end the very innocents' cause would have. But we, in a heathen Countrey, having our great enemies two of the chiefest men in the whole Towne, wanting an interpreter, ignorant of that Countrey language, did in the end see our great adversaries cast into prison for our sake, and deprived of their Offices and honour for not doing justice,—yea not to escape death: for, as the rumour goeth, they shal be beheaded."

Names of able magistrates, like Pao Lung-Tu and Lan Lu-Chow, have been handed down with reverence for centuries in popular fame. And the Chinese trial magistrate, at his best, developed a high degree of professional skill—that skill which has always in the Orient commanded the wonder and admiration of the multitude,

## 7. *Practical Justice*

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—a combination of intuition and experience in discriminating between guilty and innocent without the aid of a formal system of proof. Modern testimony to this is borne by an eminent British consular officer, the best informed observer of Chinese justice:<sup>dd</sup>

“The singular keenness of the mandarins, as a body, in recognizing the innocent and detecting the guilty (that is, when their own avaricious interests are not involved) makes the contingency [of a false confession under violence] so rare as to be almost unknown. A good instance came under my own notice at Swatow in 1876. For years a Chinese servant had been employed at the foreign Custom House to carry a certain sum of money every week to the bank, and at length his honesty was above suspicion. On the occasion to which I allude he had been sent as usual with the bag of dollars, but after a short absence he rushed back with a frightful gash on his right arm, evidently inflicted by a heavy chopper, and laying the bone bare. The money was gone. He said he had been invited into a tea-house by a couple of soldiers whom he could point out; that they had tried to wrest the bag from him, and that at length one of them seized a chopper and inflicted so severe a wound on his arm, that in his agony he dropped the money, and the soldiers made off with it. The latter were promptly arrested and confronted with their accuser; but, with almost indecent haste, the police magistrate dismissed the case against them, and declared that he believed the man had made away with the money and inflicted the wound on himself. And so it turned out to be, under overwhelming evidence. This servant of proved fidelity had given way to a rash hope of making a little money at the gaming table; had hurried into one of these hells and lost everything in three stakes; had wounded himself on the right arm (he was a left-handed man), and had concocted the story of the soldiers, all within the space of about twenty-five minutes. When he saw that he was

## *IV. Chinese Legal System*

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detected, he confessed everything, without having received a single blow of the bamboo; but up to the moment of his confession the foreign feeling against that police-magistrate was undeniably strong."

### (II) THE OLD LEGAL SYSTEM

8. The dates of the earliest Chinese Codes or laws are doubtful. The legendary history of China goes back to B. C. 2500 or earlier; but the oldest textually transmitted historical records date from about B. C. 1200. Some beginnings of codes, now lost, are attributed to the prior interval. But the earliest code whose text is now extant is that of Chow, about B. C. 1100, said to have been composed by Tan, duke of Chow, brother of the founder of the Chow dynasty.

This code, known as Chow Li, or Regulations of Chow, was sought to be extirpated by the great "Burning of the Books", in B. C. 212. This was a holocaust, decreed by an erratic ruler, who forbade all invocation of the constituted customs of the past and thus aimed to free his own notions of government from all conservative criticism; "the only books which should be spared are those on medicine, divination, and husbandry; whoever wants to know the laws may go to the magistrates and learn of them." But his expedient (unlike Justinian's) was futile. The Chow Li, with many other classics, was secretly preserved; its text was rescued and officially restored in

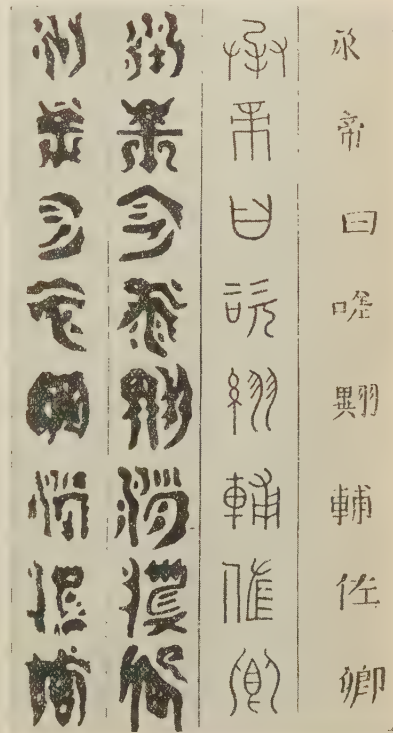


## 8. Codes

the very next generation; and some of its principles have doubtless continued as the basis of all intervening legislation.

The Chinese earliest laws were recorded in a primitive form of script; one of the earliest styles dates from perhaps B. C. 2300, and was itself developed from a still earlier pictograph (whence a supposed primitive relationship between Egyptians and Chinese); and from that origin, by various stages, the modern form has evolved.<sup>7</sup> The material originally used was bamboo wood; but stone was often used for giving permanent publicity to single decrees, even into modern times. Block printing did not come till about A. D. 900.

After the Burning of the Books, many vicissitudes of codification ensued. The Tang dynasty, for example, about A. D.



IV. 7—EVOLUTION OF THE  
LAW SCRIPTS

#### *IV. Chinese Legal System*

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640, issued a code of some 500 articles. The Tartar emperor Timur (grandson of Kublai Khan) about A. D. 1320, promulgated a code of 2500 articles. But none of the conquerors from the north attempted to alter essentially the traditional laws and customs of the Chinese. The great Tartar ruler, Kublai Khan ("In Xanadu did Kubla Khan A stately pleasure-dome decree"), who conquered China about A. D. 1260, founded the Yuen dynasty, and established Peking as his capital city, proclaimed that "the doctrine of Confucius was a law destined to govern all generations, . . . and all should conform strictly to its divine behests; . . . for the state's laws are constant and invariable, and must be obeyed as the rule of conduct for all." The most radical innovation attempted by the all-powerful and broad-minded Kublai Khan was the introduction (A. D. 1269) of an alphabet, especially constructed on his order by a Tibetan scholar, to supplant the multifarious Chinese ideographs; and the very decree above, confirming the traditional laws, was promulgated in this alphabet.<sup>8</sup> But solid Chinese habit and thought was proof against even this change; and after his death its use gradually lapsed.

In the ensuing (native) Ming dynasty, about A. D. 1400, the minister Yung Lo framed a new general code; and on this code was founded that of the next (con-



#### IV. Chinese Legal System

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quering) Manchu dynasty, the Tsing, some two centuries later. This Ta Tsing Lu Li, or Code of Tsing, became law about A. D. 1650, and endured until the revolution of A. D. 1912.<sup>9</sup>

This work consists, first of a code proper, called *Lu*, the text of which never changed; and secondly, of the annual edicts and judicial decisions, called *Li*, which interpreted the *Lu*, made them flexible, and adapted them to progress,—much like the function of Equity alongside the Common Law. There were about four hundred and fifty *Lu* sections, and (in the edition of 1907) about two thousand *Li* sections. The page (reading downwards, right to left) shows the *Lu*, or fixed constitution, printed in the lower space; the judicial rulings are seen above; and the *Li*, or annual modifications, are printed in the middle.<sup>10</sup> Every five or ten years a new edition was promulgated, with these interpretations inserted cumulatively at the code sections, thus bringing the system up-to-date,—a method not unlike the one followed in imperial Russia since 1860, and now, in part, in Wisconsin.

The following passages of the *Lu*, on the law of Adoption, illustrate the style of this code:<sup>e</sup>

[*Code Provisions on Adoption.*] “Whoever appoints his heir and representative unlawfully, shall be punished with 80 blows.—When the first wife has completed her fiftieth year, and has no children living, it is allowed to appoint the eldest son by the other

嘉慶十年新鐫

輯註通纂

比引條例督  
捕則例附後

大清律例重訂

遵照嘉慶六年奉  
部頒行續纂并增修近年條例

工本浩繁每部發  
價銀三兩六錢

IV. 9—TA TSING LU LI (CODE OF TSING), A. D. 1650  
This code, shown in its title-page, endured till the revolution of A. D. 1912



備此公  
 事犯犯  
 門事犯  
 者見五  
 事便受  
 財出錢  
 通錢人  
 受財事  
 無罪者  
 車間不  
 應見  
 許財物

解注有事二字須看得清蓋有事犯事也本人有罪行財而求租  
 免先求出已罪而得枉法也本人無罪行財而求租是求入人罪  
 而得枉法也因有遊難就易之文解者俱就本人犯事言之若行財  
 而得枉法或全枉或枉強為重當論所枉之事較其輕重也  
 解注得枉法上注一欲字最得律意不問官吏求為枉法與否而行  
 求本含欲得枉法即應以此條判斷所以得其心也  
 解注以財付家下註有官吏二字後引證等項又明言官吏似謂官  
 人欲捕而行財家散亦應坐此律也若為家強人通鄉取受出錢人  
 亦不坐一  
 解注如犯事者為得相客隱之說廣言者而行財求免後行財事終  
 覺則止坐行財之罪所犯原罪與自首律論免或謂親屬告發原本  
 應免雖行財實無枉法然行財之心則欲求枉法也論其心不論其  
 事此律意也

有事以財請求

凡諸人有事以財行求官吏得枉法

者計所與財坐贓論若有遊難就

易所枉法之重計於者從重論生

入其官更引證用強生事逼抑取

受者出錢人不坐遊難就易請

易受之輕罪也若他律遊難則

以上諸條皆言受財人之罪此

俗則言出財人之罪也凡請邑

人等本身有事而以財行求

於官吏乞為國斷以得枉法者

計所與財坐贓論若有遊難就

累律按所出之數折半科罪至

五百兩罪止杖一百徒三年若

所行求之事有親避其罪難坐

就其所易而所枉之罪重於行

求之罪者從重論其入官所

謂彼此俱罪之賊也若本人原

無行求之責而求行官吏或人

此杜制有...

IV. 10—CODE OF TSING (INTERIOR PAGE)

The Lu, or original fixed laws, are printed in the lower space; the Li, or annual modifications, are in the middle; and the judicial rulings are above. The text reads downward, right to left, in each division

## 8. Codes

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wives to the inheritance; but if any other than the eldest of such sons is so appointed, it shall be deemed a breach of this law.

"If a person, not having sons himself, educates and adopts the son of a kinsman, having other sons, but afterwards dismisses such adopted son, such person shall be punished with 100 blows, and the son shall be sent back to, and supported, as before, by the adopting parents.

"Nevertheless, if the adopting parents shall have subsequently had other sons, and the natural parents, having no other, are desirous of receiving their son back again, they shall be at liberty so to do.

"Whoever asks for, and receives into his house as his adopted son, a person of a different family name, is guilty of confounding family distinctions, and shall therefore be punished with 60 blows; the son so adopted shall, in such cases, always be returned to his family.—In like manner, whoever gives away his son to be adopted into a family of a different name, shall suffer the punishment decreed by this law, and receive such son back again. Nevertheless, it shall be lawful to adopt a foundling under three years of age, and to give the child the name of the family into which it is adopted; but such adopted child shall not be entitled to the inheritance upon failure of the children of blood.

"If the relative appointed to the inheritance, on failure of children, is not the eldest in succession, it shall be deemed a breach of this law; the relative so appointed shall be sent back to his place in his own family, and the lawful heir appointed in his stead."

The following passage, from the law of Mortgage, illustrates the way in which the *Li* (or annotations) served to apply, interpret, and modify the *Lu* (or fixed text).<sup>f</sup>

## *IV. Chinese Legal System*

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First comes the Lu:

"[1] Whoever takes lands or tenements by way of mortgage, without entering into a regular contract, duly authenticated and assessed with the legal duty by the proper magistrate, shall receive 50 blows, and forfeit to government half the consideration money of the mortgage.

"[2] If the mortgagor does not transfer to the mortgagee unreservedly the whole produce of the land upon which the taxes are charged and made payable to government, he shall be punished in proportion to the extent of the property, in the following manner: if from one to five *meu*, with 40 blows, and one degree more severely for each five additional *meu*, until the punishment amounts to 100 blows; the land so illegally mortgaged shall be forfeited to government.

"[3] If the proprietor of lands and tenements already mortgaged attempts to raise money thereon by a second mortgage, the amount obtained upon such false pretences shall be ascertained, and the offender punished accordingly, as in the case of an ordinary theft, to the same extent, except that he shall not be liable to be branded.

"The pecuniary consideration received by the fraudulent mortgagor shall be restored always to the mortgagee, unless such mortgagee is himself privy to the unlawfulness of the transaction, in which case it shall be forfeited to government. The said mortgagee and the negotiator of the bargain, when either of them is acquainted with the unlawfulness of the transaction, shall moreover receive the same punishment as the mortgagor. In all such cases, the first and lawful mortgagee shall remain in possession.

"[4] If, after the period specified in the deed by which any lands or tenements are professed to be mortgaged or pledged by the proprietor, is expired, the said proprietor offers to redeem his property by the payment back of the original consideration upon

## 8. Codes

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which he had parted with it, it shall not be allowed the mortgagee to refuse to comply; any instance of such refusal shall subject him to the punishment of 40 blows, and to the forfeiture of all the produce of the land which he may have reaped after the expiration of such period. Nevertheless, this law shall only have effect when the proprietor is really able at the expiration of the prescribed period to redeem his lands, and not otherwise."

Next comes the Li (or, annotations), and here we show a part of the Li of 1799 and the Li of 1907 in comparison;<sup>g</sup> they both deal with paragraph 4 only of the above text, on the mortgagor's right to redeem or receive the surplus value. (It will be remembered that, in the evolution of mortgage law in every system<sup>h</sup> the early stage entitles the mortgagee on default at the time appointed, to keep the entire property pledged, no matter how excessive its value; while in the later stages (here represented in the Chinese rules) the law compels the mortgagee to restore to the mortgagor the excess over the amount of the original loan):

[*Edition of 1799.*] "When it is expressly declared in the preamble of a deed of sale, that the land is sold absolutely, and not by way of pledge or mortgage, and there is no subjoined clause providing for the contingency of a further payment to the seller, as a consideration for his making the sale absolute at a

[*Edition of 1907.*] "Amending Edict of year 6, Emperor Chia-Tsing [1801]. If the deed is a sale absolute in form, without any clause for redemption, the original owner is forbidden to make any claim at a subsequent time for redemption; such a claim shall subject him to punishment. And if the owner

#### *IV. Chinese Legal System*

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subsequent period; such a deed of sale shall be an effectual bar against all claims whatsoever of redemption. But if the sale is not expressly declared to be absolute, or if there is a general clause of redemption, or a specific one of redemption at any time after the expiration of a certain period, the original proprietor shall, according to the terms of the agreement, be entitled to recover his land, upon repayment of the consideration for which it was pledged or mortgaged. If the original proprietor, at the end of the period specified in the contract, is still unable to discharge the mortgage, it shall be at his option, either to retain his right to a recovery of his land, at any future period, or to surrender it, and make the sale absolute, in consideration of a receipt of a further sum to be agreed upon between him and the mortgagee, or between arbitrators duly appointed by the parties. If they cannot agree upon the terms, the mortgagee shall have the option of either continuing in possession, or of re-imbursing himself, by re-mortgaging the

of land sold with a clause for redemption makes claim for redemption before the time stipulated in the deed, he shall be subject to punishment."

Judicial Ruling [undated].  
"The maximum period for land sold on mortgage shall be 10 years. If the period specified in the deed exceeds this limit of 10 years, the clause is of no effect, and the parties privy to it are punishable."



## 9. Conveyancing

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land to some other person, the right of redemption remaining as before with the actual proprietor.

"It is however declared that all deeds of sale which are doubtful, or imperfect, owing to the tenor of the preamble, but which contain no clause of redemption, shall, if not questioned or objected to for thirty years from the date thereof, become to all intents and purposes absolute."

9. Two documents from the 1870's, under the foregoing chapter of the code, will illustrate the degree of skill developed in the conveyancing of Chinese land.<sup>1</sup> It may be noted that a Chinese deed can be executed with the same expedient as our own "indenture", i. e. the grantor signs an original and the grantee a counterpart, and then the word "contract", or the like, is written in large characters so that one half appears on one document, the other half on the other. The following documents are the grantor's originals of a mortgage, consisting first of a deed of sale with condition subsequent for re-purchase, and next, after several years, of a release:

[*Mortgage-Deed and Release.*] *Original Mortgage.* "I, Tsien Yi, and my younger brother, Ping, signers of this original mortgage of land and house, finding ourselves in need of money for an honor-

#### *IV. Chinese Legal System*

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able purpose, and having employed as brokers Doe and Roe for the purpose of arranging terms, are on due reflection fully decided to deliver in mortgage to the church known as Chong-Yi, as a property for the common use of the Catholic Mission in this country, for the sum of ..... ounces of pure silver weighing ....., the current rate for mortgage transactions, the house and land hereinafter described, which were devised to us by our forefathers. (1.) The house includes: (a) a dwelling of ..... stories and ..... rooms from top to bottom; (b) a second dwelling formed by the large reception room and adjacent rooms, ..... rooms in all; (c) wings, in stories, east and west, having the two said dwellings between them, and numbering ..... rooms; (d) a small service-building, of ..... rooms, behind the east wing; (e) a flower garden behind the service-house, in which is a summer-house, in stories, and a garden-house, in all ..... rooms; (f) and lastly another building, one storied, ..... rooms. Total number of rooms, ....., including large and small, and upper and lower stories. Walls to the estate, doors and windows, the partitions (both wood and brick), rockeries, stone garden-steps, trees and flowers, bamboo groves, kitchen, wells, latrines, all the aforesaid are complete; we are to prepare in duplicate a list of these appurtenances. (2.) The premises of the said house and garden, with an additional plot belonging thereto, include ..... acres and ..... tenths of an acre, and are located in the district of ..... at the street and bounds as described hereinafter.

“(3.) The money has been paid and the deeds delivered at the same time, without any reservation of amounts to pay charges thereon. It is agreed that no interest will be payable on the money received, nor rent payable on the premises; that the term of tenure shall be nine years; that during that period the new owner may deliver the said premises in mortgage to another person for the same amount; that, on the expiration of this period I may buy back my property on repayment of the same amount; that if at that time

## 9. *Conveyancing*

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I have not the money, I cannot oblige the new owner to pay the excess value and accept a complete and final title.

“(4.) The said land and house are hereby declared to be owned by us, and no relative, whether ascendant or descendant, has any claim to it; nor has there been any sale to other persons; if any claim to the contrary shall be made, it will be settled by us, we holding harmless the new owner. (5.) From the date of this deed, the new owner shall enjoy the property, either by living on it himself or by leasing it to others for hire.

“The foregoing is agreed to by both parties, and neither has any other terms to make. For future proof of the transaction we have executed this original mortgage of the land and house in testimony thereof.

“In particular:

“The house, facing the south, is located on the north side of ..... street, in the county ....., town ....., ward ..... The four bounds are: on the east, to the middle of the alley; on the south, to the street; on the west, to the land of ....., and, on the north, to the middle of the canal.

“The government approval of the deed to the grantor, and the official certificate of title [see *post*], of the said land, as well as all preceding deeds of the prior owner, having been lost through a series of family misfortunes, in place thereof the ‘substitute deed’ [see *post*] issued by the magistrate at our request, as well as ..... stamped receipts for taxes of prior years, have been delivered to the new owner.

“It is agreed between the parties that the new owner shall make all repairs of gutters and other minor repairs; but that if timbers by rotting break, or if either walls or partitions give way, the new owner shall advance the cost of the needed repairs, the reasonable amount to be later determined by arbitration, and to be entered plainly on the mortgage deed, for reimbursement by the original

#### IV. Chinese Legal System

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owner in case of re-purchase of the property. It is also agreed that the new owner may in his discretion add to or change the decorations, but that at the time of re-purchase he shall restore the house to its original condition.

"Year ..... of the emperor Koang-shu, month ....., day ....., I Tsien Yi, and my younger brother, Ping, have executed this original mortgage of house and land. [Then the signatures of the brokers, the head of the clan, and the notary. On the last line, a declaration that the grantors confirm the contract. Then the half of the characters forming the indenture.]

[Release.] "I, Tsien Yi, and my younger brother, Ping, signers of this irrevocable sale, having already, through the brokers ..... and ....., in year ..... of the Emperor Koang-shu, transferred in mortgage, for the sum of ..... ounces silver received in hand, to the church known as Chong-Yi, as a property for the common use of the Catholic Mission in this country, a house situated in the district of ....., on ..... street, in the county, town, and ward hereinafter mentioned, having in all ..... rooms, upper and lower stories included, together with the premises of the said house, the flower garden, and a piece of ground adjacent, measuring in all ..... acres of land, being a property inherited from our forefathers; And having afterwards, in year ....., received a supplementary amount of ..... ounces silver, and in both cases having executed deeds to the new proprietor [the second document of the series is here omitted]: Now therefore, finding ourselves in need of money for a pressing purpose, we have again requested the brokers to arrange the terms of a final irrevocable sale of the house and land aforesaid, which we have decided to make, for the sum of ..... ounces of pure silver, full weight of ....., the actual amount of the final irrevocable sale, fixed upon reflection. The full exchange of money and deeds has been made at the same time on the date of this instrument, no other receipt having been given by us. We have also delivered to the new owner the counterpart of the original

## 9. *Conveyancing*

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mortgage-deed and the detailed inventory of ornaments and repairs of the house received from him at the time of the original contract. From and after the date of this final irrevocable sale of this property, it shall no longer be lawful for us to claim either the right of repurchase or any further supplementary amount; the new owner, on his part, will at such time as he sees fit register the transfer of title and pay the tax; he shall have the right to demolish and rebuild the house; in short, he shall be the absolute owner. The said land and house are hereby declared to be owned by us, and no relative, whether ascendant or descendant, has any claim to it; nor has there been any mortgage or sale to other persons, nor any reservation of any part of the price of this sale to discharge debts, or the like. If any claim to the contrary shall be made, it will be settled by us, we holding harmless the new owner. This is our free act, and we have no other terms to make. For future proof, we have executed this final irrevocable sale of the land and house in testimony thereof.

“In particular:

“The premises of the house, facing the south, are situated on the north side of ..... street, in the county ....., town ....., ward ..... The four bounds are plainly described in the original deed. Upon delivery of this instrument to the new owner, we have received from him ..... ounces of silver, in full payment of this irrevocable sale.

“In year ..... of the Emperor Koang-shu, month ....., day ....., I Tsien Yi, and my younger brother, Tsien Ping, have executed this instrument of irrevocable sale of land and house. [Etc. as before.]”

It would be a mistake to suppose that the great age and apparent conservatism of the Chinese system are inconsistent with change and timely progress; their decennial re-edition of the code would disprove this. And an-



#### *IV. Chinese Legal System*

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other example is seen in the fact that the Torrens method of registering title to land (instead of merely recording deeds), though new among us, has been in force in China for at least 150 years. Every Chinese land-owner has his official certificate of title, which is indisputable.<sup>11</sup>

At the records office an entry of the land is made at the time of first issuing the certificate. When a piece of land is sold, the certificate of title is delivered to the new proprietor, and at the foot of the contract is noted the delivery of the certificate; thus the same certificate passes from hand to hand, with the transfers of the plot of land. A party selling only a small part of the land covered by this certificate does not deliver the certificate to the buyer, but executes a deed termed "supplementary deed" or "partition deed"; on the certificate is noted, with an attestation clause, the vendee's name, the date, and the description of the portion sold; and on the deed of sale is noted why the vendor, who keeps the certificate, has executed only a bill of sale. But if the sale covers more than half of the original plot, the vendor must deliver over his certificate, and then it is the buyer who executes a "supplementary deed", and at the foot of the certificate is added a clause describing what portion of the land is retained by the vendor. The deed itself in such cases is merely an extra precaution; the partition must be

# 遵憲清田執業方單

欽此 街補用直隸州署松江府署縣堂金 為清賦便民給單執業事案照臺縣清糧同治二

年曾經設局辦理時急待啟做致難澈底釐正現經奉縣詳擬章程稟請查辦奉

署布政司應 批速即奉酌章程分別辦理務使戶戶相符田歸有者等因又奉

督辦蘇省全書總局署布政司應 批該縣田糧外錯誤章更正均屬妥洽應准委員

會同照辦並奉

撫撫部院張 批飭全書總局核議具詳飭遵案經會同

憲委辦 設局辦理續將會辦情形稟奉

巡撫部院丁 批所議清理田糧更正戶名辦法尚為周妥等因奉此查糧賦不清由於

版高并混現在就田間業清釐糧賦之源就業徵糧永杜相墊之累如業田分散在各保

各畝仍按照版畝章程分保分畝核立的戶不使紛歧以除說弄花分積弊嗣後民間買

賣即以此單為憑因隨單轉單隨現業成交之後遵照

巡撫部院丁 札飭以年契生驗過到不准戶書經承人等再為分立說戶致壞清釐成

法凡從前舊單概作廢紙此後遇有田土涉訟如無此單即不准理除將單式詳明

各大憲立案一面勒石永遠外合將該案保畝戶號畝分科則詳列於後永為執業項至

單者

計開

坐落 縣 保 畝 畝 字 號

的 業 畝

號 田

同 治 某 年 某 月

日 給

IV. 11—CERTIFICATE OF LAND-TITLE, ABOUT A. D. 1850  
This certificate passes from hand to hand, with transfers of  
the plot of land, and is indisputable

#### IV. Chinese Legal System

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duly noted on the certificate, or else the title of the holder remains absolute and complete. In case of loss or destruction of the original certificate, a new original is not issued; but, after certain proceedings had, a "substitute deed" is used, which passes from hand to hand like the original certificate.

The following form of official certificate of title was issued for Shanghai land in the 1850's:<sup>1</sup>

[*Certificate of Title.*] "We the secretary of the treasury of the province of Kiang-su deliver these presents as a certificate of title required by law. . . . [Then follows a brief recital of the history and purport of the law.] We have received from the owner named below a petition that the plot below described be recorded with the lands subject to tax; the local magistrates have investigated the petition and the land described; they have recorded it, and have sent us a final report thereon; we have reported this to the governor of the province, who has answered consenting to classify the land in question, and to begin to receive taxes thereon. Wherefore, we are authorized to deliver to the farmer this certificate. This document is given in proof thereof.

"Entries to be made:

"The farmer \_\_\_\_\_, in the district \_\_\_\_\_, has filed a petition declaring that he desires to validate \_\_\_\_\_ acres and \_\_\_\_\_ parts of an acre of land. The plot will pay tax at the rate of \_\_\_\_\_ bushels of rice per acre, and will begin to pay from year \_\_\_\_\_. The boundaries of the plot are: on the east to \_\_\_\_\_, on the west to \_\_\_\_\_, on the south to \_\_\_\_\_, on the north to \_\_\_\_\_. Done in the year \_\_\_\_\_ of the Emperor Hien-fong, \_\_\_\_\_ month, \_\_\_\_\_ day."

## 10. *Court Procedure*

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10. The procedure of the trial courts, at the end of the 1500's, has been graphically summarized in the observations of some Spanish missionaries. Their account shows candid admiration for the methods of Chinese courts.<sup>k</sup>

"The king doth pay the judges all sufficient wages, for that it is forbidden upon great penalties to take bribes or any other thing of any clyent. Likewise the judges be straightly charged and commanded (and that is one of the chiefest articles that is given them from the council), not to consent to be visited of any clyents in their houses. Neither can they pronounce any sentence but in the place of publike audience, and in the presence of all the officers, and it must be done in such sort that all men that are in the place of audience may heare it, and is doone in this sort following:

"The judge doth set himselfe in the seate of justice, then do the porters put themselves at the entring or doores of the hall, who do name with a lowde and high voice the person that doth enter in to demand justice, and the effect of that he doth aske. Then the plaintife doth kneele downe somewhat a far off from the judge, and doth with a loud voice declare his griefe or demand, or else in writing. If it be in writing, then one of the scriveners or notaries doth take the petition and doth read it, the which being understood by the judge, he doth straightwaies provide upon the same that which is agreeable unto justice, and doth firme the petition with his own firme with red inke, and commandeth what is needful to be done. . . . . These matters being executed in publike (which is marvelously observed and kept), it is not possible that any of the officers should take any bribes, but it must be discovered by one of them; and for that they are used with great rigour in their residence, everie one is afraid of his companion, and are one to an other (in this case) great enemies. . . . .

#### *IV. Chinese Legal System*

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"In all matters of lawe, as civill as criminall, the judges do nothing but by writing, and do pronounce the sentences, and examine witnesses in publike, before all the rest of the officers, because no subtilty nor falshood shall be used in their demaundes, neither in their writings, to set downe other then the truth. Everie witsnesse is examined by himselfe, and if he do double in his declaration, then do they joyne together and make their demaunde from one to an other, til by their striving they may come to a better knowledge of the truth. But when by these meanes they cannot bring it to light, then doo they give them torments to make them confesse, beleeving that without it such persons as have experience and knowledge will tell the truth.

"In matters of great importance, and such as doo touche grave personages, the judge will not trust the scrivener or notarie to write any information; but they with their owne handes will write the declaration of any witsnesse, and will consider verie much of that which is declared. This great diligence is the occasion that fewe times there is any that doth complaine of any ill justice doone; the which is a great and notable vertue, and ought to be imitated of all good justices, for to avoyd many inconveniences which doo happen for the not using the same, the which these Gentiles have great care to performe."

11. There were no lawyers (as we understand the term) in the Chinese system. There were notaries, and brokers who acted as attorneys; but no licensed professional class, either of advocates or of jurisconsults, as at Rome. But well-informed observers tell us that all Chinese are fairly well acquainted with both the customary and the statute law, owing to the fidelity with which the laws reflect the common usage. And the local magis-



## 11. *Appellate Justice*

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trate's justice, when he was in doubt, could be reviewed in an elaborate system of appeals,—from district to province, and thence to the capital at Peking.

There sat the Supreme Court, in the Imperial palace-city; and this body of men, learned in the law, revised the lower court rulings. The opinions show as keen and logical distinctions as those of any court in the Occident. From time to time, collections of leading decisions of the Supreme Court,<sup>12</sup> were published and studied as precedents,—in Chinese words, Hsing An Hui Lau. Every magistrate had to possess a copy of this book. Here are a few illustrative decisions from the last century.<sup>1</sup>

[*Supreme Court Decisions.*] *Lee's Case*:—"Seventh year of the Emperor Tao Kwang [1827]. One Lee Szu, being the nearest relative of Mrs. Lee, a widow, had been adopted as the son of Mrs. Lee, forty years ago. Afterwards, Lee Szu was convicted of manslaughter and sentenced to be banished accordingly.

"Mrs. Lee appealed for pardon upon the ground that Lee Szu was her only heir, so that his banishment would have left her without a legal heir. It also appeared that she was very old, about 71 years of age.

"[Held] It has been the general law of this country that the adoption, as son, of a person not having the same family name as the adopting party, is absolutely illegal.\* The adopting party is subject to criminal punishment, and the adopted party must return to his original family. And further, if there is no direct issue of the body, the nearest relative having the same family name is entitled

\*[This law has been quoted *ante*, in the text, par. [4] of the passage on Adoption. For the reason of this rule, see the book of Wilkinson, cited *post*.]

續增刑案匯覽 卷十三

子孫違犯教令

縱妻通姦致父被姦夫拒斃

川督 題謝泗海縱容伊妻謝羅氏與張汶連通姦

被伊父謝雲斌瞥見捉拿張汶連起意拒捕將謝雲斌毆傷身死後復假裝自縊屍子謝泗海聽從張汶

連私埋匿報將謝泗海比鄰子犯姦盜父母並本縱

容被人謀故殺害擬絞立決例量減滿流

道光十一年案

縱起爭姦縱容之母被人毆死

江西司 題王明太毆傷老王林氏身死一案查案

內之王金秀與王周氏通姦伊母老王林氏知情縱

## 11. *Appellate Justice*

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to be instituted as heir. In the present case, Lee Szu was the only relative having the same family name of Mrs. Lee. [Hence no other person could be lawfully adopted by her.] So therefore, to banish Lee Szu would tend to put Mrs. Lee, in view of her old age, in an extremely grievous and deplorable condition.

“Pardon is granted.”

*Wong v. Kwa.* “Tenth year of the Emperor Tao Kwang [1830]. Mr. Wong contracted with Miss Kwa to marry. Subsequently, Mr. Wong departed the country to Harmi, to carry on business there, and did not return to his hometown until about ten years later. In the seventh year of Wong’s absence, Miss Kwa, with knowledge that Wong was in Harmi, married a third person, in spite of the contract to marry with Wong. Mr. Wong, returning home after the said marriage, demands the specific performance of his contract of marriage.

“[Held] Specific performance is granted, upon the ground that the marriage with a third person was void because of bad faith, even though the marriage has been consummated and a son been born to her. As a general rule, a continued absence for three years, without being heard of, may raise a presumption that the absent party is actually dead, and in such case a girl [under contract to marry the absentee] may lawfully be married to a third person, upon getting a license from the magistrate, as if she were never engaged. But the present case is not within this rule; for though Wong was absent for nine or ten years, yet his whereabouts was known to the other party.

“Specific performance is decreed.”

There were special series of (what we should call) criminal decisions; and a favorite type of book for popular reading was a collection of famous cases, like our collections of “*causes célèbres*”, common in Europe in the

#### IV. Chinese Legal System

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last century. The following report of a homicide case of a century ago illustrates the method of investigation and the process of appeal, as well as the principle of law involved; the original is a communication (dated 1808) from the Mayor of the port of Canton, transmitting to the Chinese Merchants' Guild a copy of the Supreme Court's decision:<sup>m</sup>

[*Record of a Homicide Appeal.*] [*Mayor's Letter.*] "I have received information from His Excellency the viceroy to the following effect:

[*Viceroy's Letter.*] "On the 26th of the first moon of the 13th year of Kia King, I received the following dispatch from the Supreme Criminal Tribunal at Peking, relating to a case that had been tried in this province:

[*Supreme Court's Opinion.*] "A decision having taken place upon a case which we had laid before his Imperial Majesty for ratification, it is now fit and necessary that we should communicate the same to your excellency, as viceroy of Kwang-Tung and Kwang-See, to the end that the same may be duly carried into effect under your excellency's direction.

"His Majesty's Inner Council having, in the first instance, issued a transcript of the report of the viceroy of Kwang-Tung and Kwang-See, stating his investigation of the case of a foreigner, Edward Sheen, opening a window-shutter in an upper story, and dropping a stick so as to hit and occasion the death of Leao-a-teng, a native of this empire; His Majesty was pleased on the 8th of the 11th moon of the 12th year, to direct that our tribunal should revise the same and pronounce judgment thereon.—In obedience to orders, we accordingly, on the 10th day of the moon, took the said transcript into consideration; and we found that the viceroy's report

## 11. *Appellate Justice*

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was grounded, in the first instance, on a report of the magistrate of Nan-hay-Sien, a district of Canton, which was to the following effect:

[*Magistrate's Report.*] "On the 18th day of the first moon of the present year, Leao-a-teng, a native of the district Pun-yu-Sien, went with his wife's brother Chao-a-Sse, to buy goods in a street within the said district, called She-san-hang, and happened to pass along the stone pavement under a warehouse called Fung-tay-hong. At the same time an Englishman named Edward Sheen, who was in the upper story of the said warehouse, in attempting to open the window, slipped his hand and dropped a stick, which, Leao-a-teng not expecting, could not avoid, and was therefore struck therewith on the left temple, so that he fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who being thus informed of the particulars thereof, came and assisted the said Leao-a-teng to return to his home, and procured him medical assistance, which however had no effect, and the wounded man expired on the evening of the following day, the 19th of the moon. The brother of the deceased then reported the case to the head-man of the district; and by him, information was laid at the tribunal of Nan-hay-Sien, where the witnesses of the fact having been, in consequence, assembled and examined, the chief of the said [English] nation was called upon to deliver up the said criminal Edward Sheen, for examination and trial."

[*Supreme Court Opinion*, resumed.] "The viceroy proceeded to state, that repeated orders were, in consequence, issued to the Hong merchants on the subject, and through them to the chief of the said nation; in reply to which it was alleged, that the said criminal was sick of an ague and fever, and undergoing medical treatment for his recovery: at length, after repeated applications, it was reported that he had recovered from his sickness, whereupon the magistrates of the district confronted the criminal with the relations of the deceased, and having finished the investigation in



#### IV. *Chinese Legal System*

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due form, referred the consideration of the proceedings to the chief judge, by whom the same process was renewed, and the result finally transmitted to the vice-regal office. His excellency having concluded the enquiry, by personally and strictly examining into the affair himself, ascertained that:

[*Viceroy's Report*, quoted.] "Edward Sheen is a native of England, engaged for hire to perform the duty of a seaman, on board the ship of Captain Buchanan, a merchant of the same nation. The said ship having been laden with a cargo of goods for trade, in the said kingdom of England, had arrived at the port of Canton and anchored in the reach of Whampoa, in the course of the 12th moon of the 11th year of Kia-King, after which the cargo was landed, and deposited in a warehouse or factory called Fung-tay-hong in the suburbs of the city of Canton. Edward Sheen had immediately thereupon accompanied Captain Buchanan and others to the upper story of the said warehouse or factory, in order to dwell therein, until, the returning cargo having been received, the period of departure should arrive. This upper story was also contiguous to and overlooked the street and path-way, towards which window was opened with moveable shutters. It happened also, that Leao-a-teng, a native of China, accompanied by his wife's brother Chao-a-Sse, went to the street called She-san-hong, to buy goods; and passing at the same moment under the said upper story, was struck and wounded by the end of the stick falling, as aforesaid, upon his left temple; and he thereupon fell to the ground. Chao-a-Sse acquainted Leao-a-lun, the brother of Leao-a-teng, with the accident, who, upon being informed thereof, immediately came and assisted Leao-a-teng to return to his home; and afterwards procured him medical assistance; all which, however, proved of no avail; and the wounded man died on the evening of the following day, the 19th of the moon. Now, the aforesaid criminal, Edward Sheen, having been repeatedly examined, has acknowledged the truth of all the facts here stated, without any reservation.— Con-

## 11. *Appellate Justice*

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sequently, in this case, there is no appeal against the conviction of this offender, Edward Sheen; who, having been proved guilty of accidental homicide, may be sentenced to pay the usual fine, to redeem himself from the punishment of death by strangulation."

[*Supreme Court Opinion*, resumed.] "The foregoing being the substance of the report of the viceroy to his Imperial Majesty, we have deliberated thereon, and have ascertained that, according to the preliminary book of the penal code, all persons from foreign parts, committing offences, shall undergo trial and receive sentence according to the laws of the empire. Moreover, we find it declared in the same code, that any person, accidentally killing another, shall be allowed to redeem himself from punishment, by the payment of a fine. Lastly, we find, that in the 8th year of Kien-Lung [1743] it was ordered, in reply to the address of the viceroy of Canton then in office, that thenceforward, in all cases of offences by contrivance, design, or in affrays happening between foreigners and natives, whereby such foreigners are liable, according to law, to suffer death by being strangled or beheaded, the magistrate of the district shall receive the proofs and evidence thereof, at the period of the preliminary investigation, and after having fully and distinctly inquired into the reality of the circumstances, report the result to the viceroy and sub-viceroy, who are thereupon strictly to repeat and revise the investigation. If the determination of the inferior courts, upon the alleged facts, and upon the application of the laws, is found to have been just and accurate, the magistrate of the district shall lastly receive orders to proceed, in conjunction with the chief of the nation, to take the offender to execution, according to his sentence. In all other instances of offences committed under what the laws declare to be palliating circumstances, and which are therefore not capitally punishable, the offender shall be sent away to be punished by his countrymen in his own country.

"The case of the Englishman, Edward Sheen, opening a window-shutter in an upper story, and the wooden stick which supported it

#### IV. Chinese Legal System

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slipping and falling down so as accidentally to hit Leao-a-teng, a native who was passing by, and by striking him to occasion his death, appears to be, in truth, one of those acts, of the consequences of which neither sight, hearing or reflection could have given a previous warning; there was therefore, no intention to injure, and the case is evidently agreeable to the construction stated in the commentary upon the law of accidental homicide. The said Edward Sheen ought therefore, conformably to the provisional sentence submitted by the viceroy to his Majesty, to be allowed to redeem himself from the punishment of death by strangulation [to which he would otherwise have been liable, by the law against homicide by blows], by the payment of a fine of 12 leang 4 sen and 2 lee [about 41£. 3s. sterling], to the relations of the deceased, to defray the expenses of burial; and then be dismissed to be dealt with in an orderly manner in his own country.

“We thus respectfully laid before his Imperial Majesty, our deliberate judgment upon this case, with the considerations whereupon it is founded, and humbly solicited a declaration of his Majesty’s pleasure regarding the same.

“On the 17th day of the 10th moon of the 12th year [January 1808] the address was laid before his Majesty, and received his Majesty’s answer in these words: ‘We ratify your judgment.’

[*Viceroy’s Letter*, resumed.] “The above communication of the Supreme Criminal Court, having reached the vice-regal office, I, in the first instance, directed the provincial judge to attend to the strict execution of the Imperial decree, by forthwith taking the said Edward Sheen and delivering him to the chief of his nation, in order to his being sent back to be governed in an orderly manner in his own country; the usual fine being at the same time duly recovered, for the re-imbusement of the relatives of the deceased for the expenses of his interment: the exact time of dismissal of the said foreigner, and of the reimbursement of the said relatives, are to be duly ascertained and reported to me; but I think fit, moreover, to

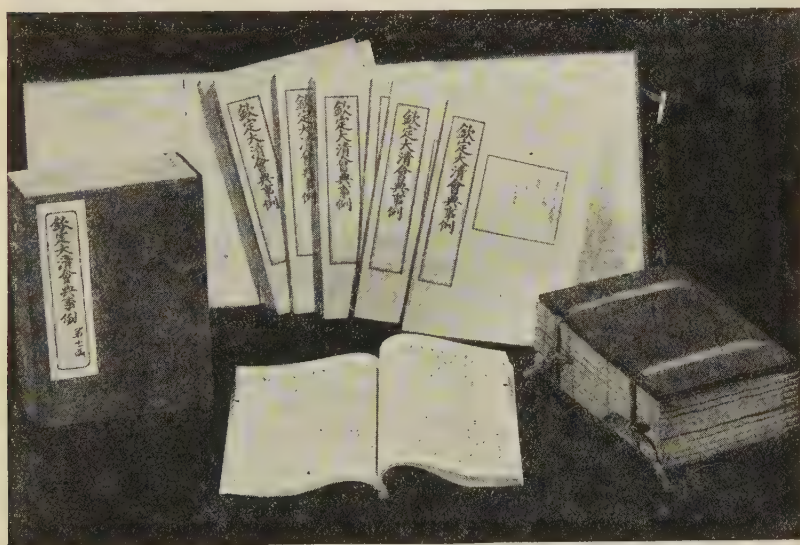
## 12. Law-Books and Edicts

communicate these things to your excellency, that you likewise may co-operate in attending to the due execution thereof."

[*Mayor's Letter*, resumed.] "His excellency the viceroy's communication having been transmitted to me, as Mayor, at my office, I determine to make it known to you also, Hong merchants, that you may, agreeably to these my orders, attend to the due execution of all things therein required. May you respectfully conform to these orders.

"The 7th of the 2d moon of the 13th year of the Emperor Kia-King [February, 1808]."

12. A Chinese law-book was usually printed in several paper-bound booklets,<sup>13</sup> and six or eight such



IV. 13—A GROUP OF LAW-BOOKS

A law-book was usually printed in several paper-bound booklets, and six or eight were placed together between board covers tied with a clasp or cord



#### IV. Chinese Legal System

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booklets were placed together in board covers tied with a clasp or cord. Numerous practice books were compiled, for the guidance of the trial judges; one of the most popular, called "Official Practice of the Ching Dynasty", or Ta Ching Hui Tien Tse Li, served as the magistrate's "vade mecum", much as Burn's Treatise on the Justice of the Peace used to serve in England two centuries ago.

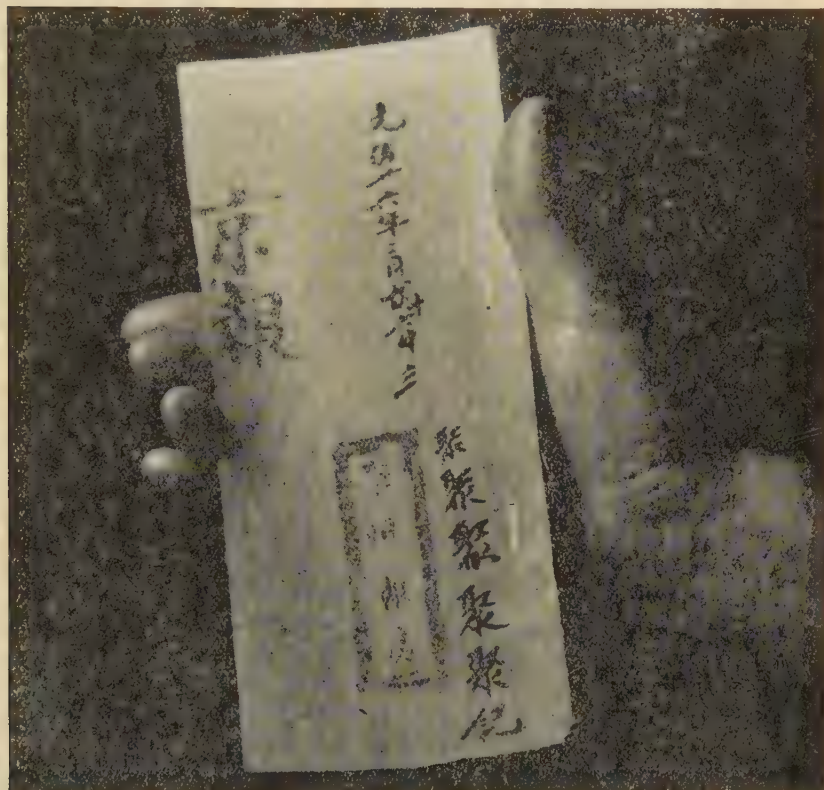
The various decrees of the Emperor,<sup>14</sup> as they were issued, were published in small oblong separate leaflets, about eight inches long and three inches wide, under the name of Ching Pao, or Official Gazette, and these served somewhat like our session laws. In outward appearance, they are trivial; but the interior pages reveal how copious a pronouncement can be made in small compass in the concise Chinese language. The following decrees of the year 1905 will serve as samples of the scope and style:<sup>15</sup> The first is a judicial rescript (as used by the Roman emperors) replying to a request for instruction of law on a particular case (and the point is just such a one as might arise under our own law); the second is a legislative edict instituting reforms in the prison system:

[*Rescript to a Magistrate on a Point of Law.*] Kwang Szi [emperor], 31st year, 5th month, 27th day. [1905]. "The governor of Kwangsi Province, Lee Yi Jing, herein petitions his majesty, the Emperor Kwang Szi, for further review of three murder cases: During the third month of the thirty-first year of the Emperor



## 12. *Law-Books and Edicts*

Kwang Szi [1905] three murder cases, namely Lao's case, Vao's case and Wong's case, were reported to the said governor for confirmation, from the Districts of Lon Shen, Yang Zo, and Shing An respectively. Lao and Vao had been duly tried and convicted of murder, therefore they ought to be hanged, according to the law.



### IV. 14—OFFICIAL GAZETTE

It consisted of small oblong separate leaflets, not durable in material or binding

#### IV. Chinese Legal System

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Wong also had been convicted of murder, but in this case the charge was more serious than the first two cases, because he feloniously killed his cousin, a person with his own family name. According to the precedents Wong should be punished by beheading, not hanging. But on the twentieth day of the third month, thirty-first year of Emperor Kwang Szi [1905], an edict was issued [subsequent to the date of Wong's offence], providing that thereafter all persons sentenced to capital punishment should be hanged instead of being beheaded. Wherefore the said governor proposes and prays that all three above convicted persons, Lao, Vao, and Wong, be hanged accordingly [the edict changing the punishment being thus made applicable to Wong's case]." "Approved: *Kwang-Szi*."

[*Edict Reforming the Prison System.*] Kwang-Szi, 31st year, 9th month, 5th day [1905]. "A proposal for improving the prisons and for a method of raising funds to give effect to the new plan, made by the administrative department of the government, is herewith brought up to the Emperor Kwang Szi for review.

"According to the policy of western nations both of Europe and America with respect to the management of prisons, great care is taken not only as to the proper size of the rooms, and sufficiency of light and air, but also as to adequate provision of food for the prisoners. In short, hygiene is the first important thing which they take into consideration. This purpose is virtually identical with our ancient ideals. Unfortunately, however, at the present time, due to the gross negligence of those who have been entrusted with the duty, the rooms in the penitentiary are too small for the large numbers of prisoners and have insufficient light and air. Moreover, the food provided for prisoners is supplied with no regard for cleanliness or for nutrition. The prisoners have been treated no better than animals. It is indeed inhuman and infamous on the part of those by whose fault the prisoners have thus been suffering. Therefore, there must of necessity be a reform of these old prisons without delay. New prisons should be built on modern designs, with rooms

## 12. *Law-Books and Edicts*

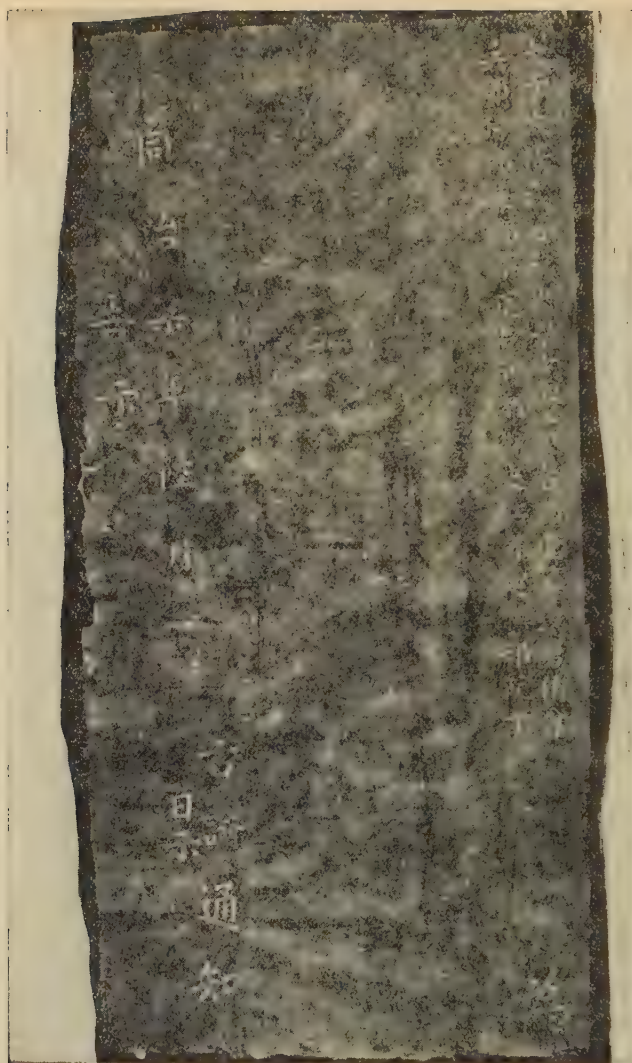
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of suitable size, sufficiently supplied with light and air; and the victualing must be managed by definite regulations. The same improvements should also be adopted in the reformatories.

"Next, attention must be given to the ways and means of carrying out this new plan. It would be advisable for the provinces of Kiangsu, Kiangsi, and Anhui to experiment first and then to use their results as the model for the rest of the Provinces. As to funds, a new tax may be imposed for that purpose. Additional contributions may be secured by each province in its own way, as it sees fit. Prizes and rewards would be given to those citizens who would devote special zeal to the campaign for contributions. Further, great honor would be awarded to those magistrates who would put into operation the new plan with the greatest success. The period for executing this new plan may be limited to one year for prisons and two years for reformatories. The above measures are herewith submitted to the discretion of his majesty, the Emperor Kwang Szi". "Approved: *Kwang-Szi*".

Sometimes these decrees, for greater continuous publicity, were inscribed on stone, and set up near a temple or other public spot; and this practice continued into modern times. One has been found on a stone set up in 1860;<sup>15</sup> the law promulgated on this stone came into play in a lawsuit in which the writer's friend's father was interested, and reveals a social psychology peculiarly Chinese. It reads:°

"It is hereby forbidden to commit suicide for the sake of making another person liable for the homicide. By the Ching Code, no one shall be held responsible for the suicide of another person. Nevertheless, reckless persons are found who kill themselves with the purpose that their relatives may bring action against another person



IV. 15—STONE TABLET WITH DECREE OF A. D. 1860  
This facsimile was made from a rubbing of the original



### 13. *Laws of the Revolution*

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for retribution and compensation; and the proceedings continue for months or even years. But no one shall be recognized to have a money interest in the death of a relative. All such actions shall hereafter be disposed of within one month, false and malicious suits shall be dismissed, and a money claim based on suicide is prohibited, on penalty of imprisonment not to exceed three years."

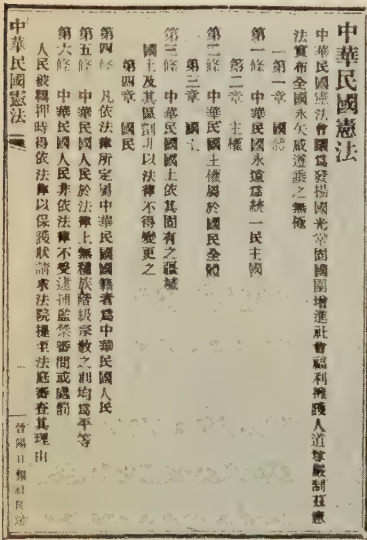
#### (III) THE NEW LEGAL SYSTEM

13. The Chinese are a unique race. They are the world's greatest pacifists; for, though their nation is the most numerous on earth, the Chinese themselves (except under one dynasty, two thousand years ago) have never gone out to seek by conquest a single acre outside of their native territory. Conversely, they have been patriotically exclusive, and have never willingly admitted strangers into that native land. And the reason, in both cases, is that they were entirely contented,—contented with themselves, with their ancestors, with their history, and with their place in the world. A Chinese governor said complacently to a friend of the present writer, less than thirty-five years ago, when the friend, an American explorer, showed him a modern world-map: "*Your map is wrong. The world is flat; and China is the centre of all nations*". Their own name for their country is Chum Kwe, or "the Central Nation"; or, sometimes, Tien Hia, meaning "all that is valuable upon earth".

But in 1912 came a constitutional upheaval, culmi-



## IV. Chinese Legal System



IV. 16—CONSTITUTION OF A. D. 1923

nating in 1923. Since 1850 the irritant influence of a half-century's contact with the democratic Occident, and the suffering under misgovernment of the Manchu foreign dynasty, had resulted in profound unrest among the educated classes. This came to an issue in 1906, and the Emperor was then compelled to promise immediate radical changes in Chin'a's constitution. Events moved rapidly, for

China. In 1911 the Throne fell; and in 1912 came the Republic, and a provisional Constitution. In 1923 this was discarded, and a new Constitution was formally adopted.<sup>16</sup> In 1931 it was again revised. Here are the first few articles:<sup>p</sup>

### CONSTITUTION OF CHINA, 1931

"Chap. I, Art. II. The sovereignty of the Republic of China is vested in the entire people.

"——, Art. III. The Republic of China shall be forever one and indivisible. \* \* \*

### 13. *Laws of the Revolution*

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“Chap. II, Art. VI. All citizens of the Republic of China shall be equal before the law, without distinction of sex, race, religion, or class.”

With the Constitution came a new formulation of law, in six compact codes, drafted on the European plan, by foreign-trained Chinese. The Supreme Court was re-organized. The building<sup>17</sup> that now forms the seat of supreme judicial authority bears a thoroughly Occidental appearance in architecture. The interior rooms are equally Occidental; American telephones, machine-made furniture, electric fans, and sheep-bound law books, now



IV. 17—SUPREME COURT BUILDING, 1922

#### IV. Chinese Legal System

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form the environment in which this august tribunal deliberates.<sup>18</sup> The Chief Justice, in his correspondence abroad, uses a typewriting machine.<sup>19</sup> The Court's decisions, digested in English and French editions, cite the new codes, tolerate portions of the old ones, and use familiarly the Occidental catchwords about "juristic acts", "public policy", and the like. Their style is illustrated in the following cases,<sup>9</sup> two civil and one criminal; the civil cases should be compared with the older cases of a corresponding sort, quoted above:

[*Modern Supreme Court Opinions.*] [Case 1.] "In reply to *Szechuen Higher Court*, Tung 510, Oct. 3, 1916.



IV. 18—MAIN COURT-ROOM, 1922



IV. 19—YU CHI-CHANG, CHIEF JUSTICE OF THE SUPREME COURT, 1925



#### IV. Chinese Legal System

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"[*Syllabus.*] Matrimonial obligations cannot be enforced by specific performance.

"[*Facts.*] A's daughter C was engaged to D the son of B. Since his daughter was unwilling to marry, A subsequently revoked the said contract. B sued A for the breach and asked the court to render judgment for specific performance of the said contract. A pleaded that his daughter was unwilling to marry, and that she had shaven her head and made herself a nun in certain temple. C further declared that she would commit suicide if any one forced her to marry. The pending question in this case, therefore, was: Whether under such circumstances specific performance could be granted?

"[*Decision and Reasons.*] As a general rule, matrimonial agreements are obligatory to the parties to the contract. But there is neither rule nor precedent as to the specific performance of such obligation, whose nature is far different from other kinds of contract. According to the law of many other nations, such obligation is not to be performed by compulsion, for it is common sense that a forced marriage can scarcely do good to either party. The fine and imprisonment for the breach of marriage contract prescribed in the provisions of the Ching Code, as suggested by the plaintiff's counsel, no longer carry weight, since the enactment of the new Criminal Code. Moreover, so far as the nature of the present case is concerned, such penalty would here be inapplicable. The controversy in this case, however, can only be remedied by the compromise of the two parties, if possible, through the admonition of the local court."

[Case 2.] "In reply to the *Kiangsi Higher Court*, Tung 1401, September 16, 1916.

"[*Syllabus.*] Where the period of a mortgage of land does not exceed ten years, redemption may be asked for by the mortgagor, although it is expressly provided in the mortgage agreement that in



### 13. *Laws of the Revolution*

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case of failure to redeem on the date fixed, the mortgagee acquires full title without making further payment.

"[*Facts.*] A mortgages his house to B, the agreement providing that the mortgage is to run for five years, at the end of which the redemption must be made, and that failure to redeem at the agreed time vests the title in the mortgagee without any further payment being made by the latter. The question is, whether eight years after the making of the mortgage agreement, A is still entitled to redeem.

"[*Decision and Reasons.*] A should be allowed to redeem. It is provided in the Regulations governing the Redemption of Mortgaged Property [quoted *ante*, page 167] that where the period of a mortgage does not exceed ten years, the mortgagor is allowed to redeem, notwithstanding a previous agreement that the right of redemption is cut off in case of failure to redeem at a fixed date."

[Case 3.] "In reply to the *Kwangsi Higher Court*, Tung 1080, Sept. 8, 1919.

"[*Syllabus.*] 1. To purchase good provisions for robbers or to sell rice to robbers constitute no offence.

"2. One who procures military information for robbers should be punished, according to the circumstances of the particular case.

"[*Facts.*] A, a woman, lived in the mountains. She often went to the city to procure military information for the robbers and to purchase food and provisions for them. She did not, however, actually participate in the act of robbing, nor did she share any robbed goods. Another person, B, lived beside the highway, a rice-dealer by trade. He often sold rice to the robbers when they passed by his store. He, too, neither participated in the robbery nor received any robbed goods. Apparently, A and B, either by procuring information for robbers or by furnishing them with food provisions, rendered material assistance to them, having knowledge that they were robbers. But there are no express provisions in the

#### IV. *Chinese Legal System*

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Criminal Code, punishing such acts. Are A and B guilty of any crime?

"[*Decision.*] 1. A and B are not guilty of any crime, merely because they furnished food provisions to the robbers.

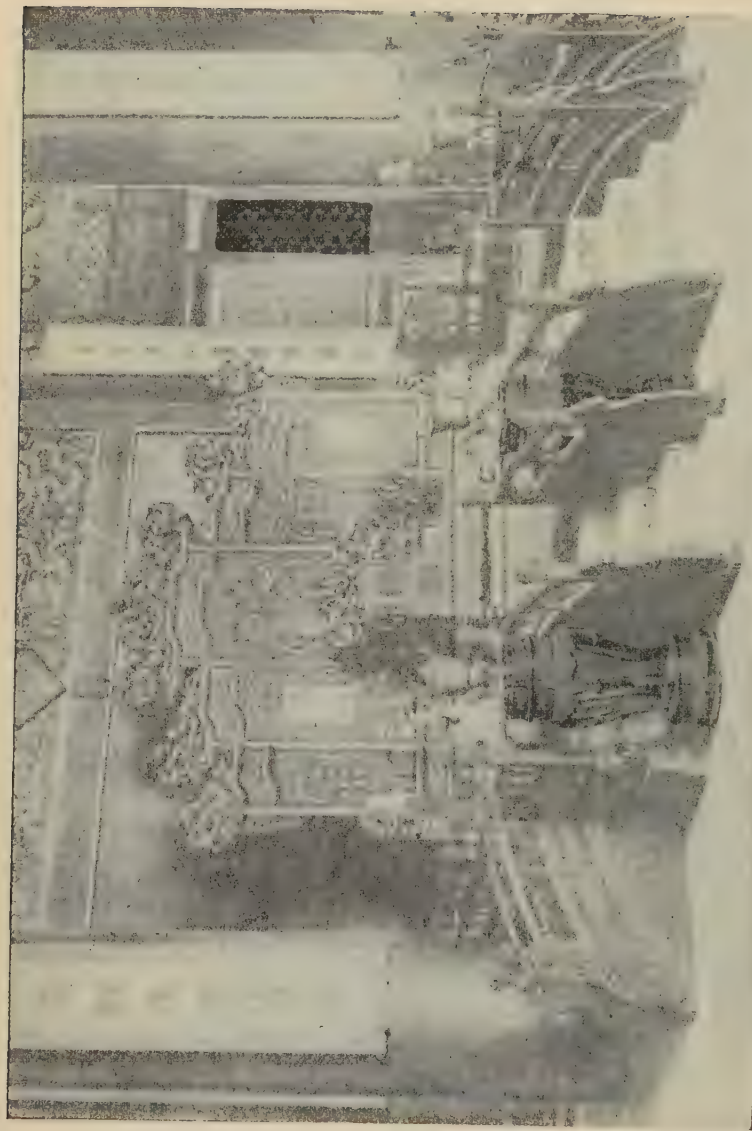
"2. A is guilty, if she is actually proved to have procured military information for the robbers.

"[*Reasons.*] As to purchase food provisions for robbers and to sell rice to the robbers are not directly connected with the crime of robbery, person doing such acts cannot be said to be guilty. So too for one who has served as cook to the robbers. (This point is covered by the decisions of the [new] Supreme Court Nos. 286 and 316). But to procure military information for robbers is otherwise, and is an offense for whose punishment provision is made in Supreme Court Decision No. 341. One guilty of this crime should be punished according to the particular circumstances of the case."

14. Whether these recent changes will supplant materially the principles and the spirit of the oldest and solidest legal system that the world has known, remains for the future to disclose. In contrast to the new Supreme Court Building, the curving gables<sup>20</sup> of the old palace of the Son of Heaven, the Emperor, may for the moment seem an anachronism. The peaceful gardens in which the most revered autocrat of the modern world once studied the Chinese classics, to learn the precepts of his ancestors, may now appear only to be relics of a discarded era. And the American bank-office style of interior fittings in the new Supreme Court's session-room is in strange disharmony with the old Imperial Throne-room,



IV. 20—AN ANGLE OF THE IMPERIAL PALACE



IV. 21—THE IMPERIAL THRONE-ROOM

## 14. *The Future*

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where the political ideas of Confucius received continuous homage through more than two millenniums.<sup>21</sup>

The earliest traditions of a Chinese code far antedate King Harmhab, the great legislator of Egypt, whose portrait-statue we have here seen; yet the Egyptian legal system was long ago buried under the sands of the Nile Valley. The Caesars and the Senators of Rome once arrayed their wives and daughters in raiment of silk coming from the already civilized people of China; but the Roman Empire has long since vanished,—a mere episode in Time's chronicle. Yet the institutions of China, in spite of repeated dynastic convulsions and vicissitudes, still live, in a virile nation of four hundred million citizens.



## IV. Chinese Legal System

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### Sources of Illustrations

1. *Map of China*. From the map in *Valentine Chirol*, "The Far Eastern Question" (London, Macmillan, 1896).
2. *Confucius and his Disciples*. From a reproduction of the mural painting by *John LaFarge*, "The Recording of Precedents", in the Capitol at St. Paul, Minnesota.
3. *Confucius*. From a colored wood-engraving, presented by Hon. *Ho Chi-Hong*, of the Ministry of Justice, Peking.
4. *Governor's Yamen*. From a photograph in *Francis H. Nichols*, "Through Hidden Shensi", p. 18 (New York, Scribner's, 1905).
5. *A Governor*. From a photograph in *F. H. Nichols* (cited *supra*).
6. *A Court*. From a photographic view in *John L. Stoddard*, "Lectures", vol. III, p. 325 (Boston, Balch Bros., 1901).
7. *Law Scripts*. From facsimiles in *Karl Faulmann*, "Geschichte der Schrift" (Leipzig, 1880).
8. *Kublai Khan*. From a facsimile in "Le Livre de Marco Polo", etc., ed. *M. G. Pauthier*, vol. II, p. 768, App. III (Paris, Didot, 1865).
9. *Ta Tsing Lu Li, title-page*. From the reproduction in *Staunton* (cited *infra*).
10. *Lu Li pages*. From the edition of 1907 (cited *infra*).
11. *Certificate of Land Title*. From the reproduction in *Hoang* (cited *infra*), p. 169.
12. *Supreme Court Decisions*. From the edition of 1866, edited by Pao Shu Yun.
13. *Group of Law-Books*. From a photograph of books in the Elbert H. Gary Law Library of Northwestern University.
14. *Gazette*. From a photograph of a collection in the Elbert H. Gary Law Library of Northwestern University.
15. *Stone Tablet with Decree of 1860*. From a rubbing obtained for the writer in 1925 by *George G. H. Ma*, Esq., of the Shanghai Bar; the original stone is in the city temple at Yangchow, and the rubbing was made by Mr. Ma Yu Po.
16. *Constitution of 1923*. From a copy in the Elbert H. Gary Law Library of Northwestern University.
- 17, 18. *Supreme Court Building*. From photographs presented to the author by Hon. *Yu Chi-Chang*, President of the Supreme Court.

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19. *Chief Justice, 1925*. From a photograph of Hon. *Yu Chi-Chang*, presented to the author in 1926 by Hon. *Ho Chi-Hong*, of the Ministry of Justice, Peking.
- 20, 21. *Imperial Palace*. From the illustrations in *Burton Holmes*, "Travelogues", vol. IX, pp. 317 and 224 (Chicago, The Travelogue Bureau, 1914).

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- b. *Analects of Confucius*, book XII.
- c. *Philosophy of Justice*. An unexcelled analysis of this principle of Chinese psychology will be found in an article by *Upton Close* (author of "The Revolt of Asia") in the "New York Times Magazine", April 17, 1927 (from which a sentence or two has been adopted). Some account of it, as applied in Japan, had been given in the present writer's "Materials for the Study of Private Law in Old Japan" (Asiatic Society of Japan, 1892, vol. XX, Supplement, part I, p. 71). That a similar principle must be taken into consideration with other Oriental races also is emphasized by *A. Mitchell Innes*, in his article on Oriental justice in the *Hibbert Journal*, XI, 273 (1896).
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- f. *Law of Mortgage*. From the translation in *Staunton*, p. 101 (Div. III, Book I, Sect. XCV).
- g. *Li of 1799 and 1907, compared*. From the translations (1) printed in *Staunton*, p. 529 (Appendix XV), and (2) MS. by *Y. Y. Wong, Esq.*, of

## IV. Chinese Legal System

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- h.* See the present writer's article on "The Pledge-Idea; a Study in Comparative Legal Ideas" (Harvard Law Rev. 1897, X, 321, 389, XI, 18).
  - i.* Mortgage Deeds. From the French translations in *Hoang* (cited *infra*), pp. 122, 127.
  - j.* Certificate of Title. From the French translation in *Pierre Hoang*, "Notions techniques sur la propriété en Chine", pp. 37, 169 (Shanghai, Mission Catholique, 1st ed. 1897, 2d ed. 1915).
  - k.* Court Procedure. From *Gonzalez de Mendoza*, "The History of the Great and Mighty Kingdom of China", ed. Staunton, chap. X (Hakluyt Society's Publications, London, 1853, vol. XIV, p. 107).
  - l.* Supreme Court Opinions. From the MS. translations, by *Y. Y. Wong*, Esq., of the Shanghai Bar, of cases in vol. VII, pp. 47 and 66, of *Hsing An Hui Lao*, edition of 1834 (year 14 of the Emperor Tao Kwang), printed by the house Tan Yue San Szu Tan.
  - m.* Criminal Appeal. From the translation in *Staunton* (cited *infra*), p. 521, Appendix XI.
  - n.* Ching Pao. From MS. translations, by *Y. Y. Wong*, Esq.
  - o.* Stone Decree. From the MS. translation by *George G. H. Ma*, Esq., of Shanghai.
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- p.* Constitution of 1931. From the French translation in "Constitution Provisoire et Lois Organiques de la République Chinoise; traduction officielle", Shanghai, Presse Orientale, 1932; furnished by courtesy of *M. Georges Padoux*, legal adviser to the Chinese Government.
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CAMBODGIA; see the Notes to Chapter V.





THE  
HINDU  
LEGAL SYSTEM



## V

### *The Hindu Legal System*

#### *(I) Races and Languages in India*

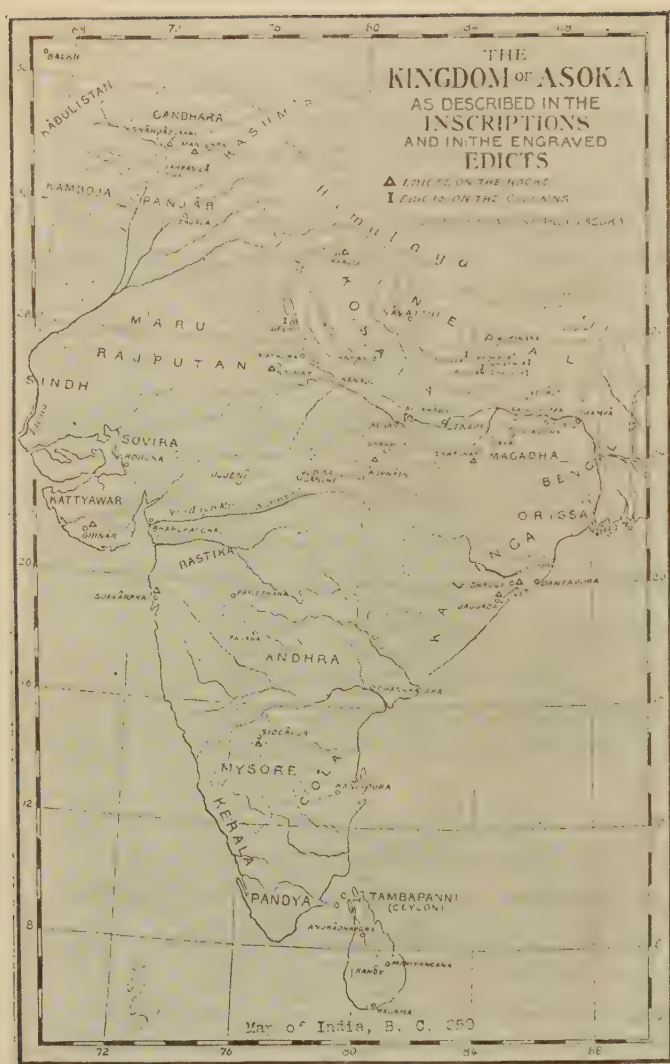
1. Heterogeneous peoples and law languages—Six successive alien dominations—Mohammedan element—Native Hindu law.
2. Sanskrit and Pali—Records on palm-leaf and stone—Deeds of B. C. 23 and A. D. 1000—Jagannatha's Rules for Conveyancing.

#### *(II) The Buddhist Branch*

3. Buddhist law—King Asoka's edicts.
4. Buddhist law in Indo-China, the East Indies and the Philippines.
5. Burmese law—Dhammathat—Court procedure.
6. Siamese law—A trial for treason in Siam.
- 6a. Buddhist law in Tibet, Mongolia, Sikkim, Nepal.
7. Eradication of Buddhism in India.

#### *(III) The Brahman Branch*

8. Brahman Laws of Manu—Caste—Village justice—Schools of Brahman law—Jagannatha on the law of gifts.
9. Courts of the rajahs—The Durbar—Brahman legal advisers—Rules of pleading—Procedure by taboo.
10. Administration of justice—Bribery and perjury.
11. Brahman law submerged by the Mohammedan conquests—Revived under British rule.
12. Sanskrit discovered and the law books translated—Custom vs. scholastic books—Hindu law in British courts.



V. 1—MAP OF INDIA, B. C. 250

## V

# The Hindu Legal System

### (I) RACES AND LANGUAGES IN INDIA



THE people of India number more than three hundred millions,—thrice the size of the population of the United States, but living in half the area.<sup>1</sup> Racially it is the most heterogeneous population anywhere on earth; it has been called “a great museum of races.” It uses some twenty-five principal languages, with over three hundred dialects. A Chinese traveler reported sixty-four different alphabets, as long ago as the time of Christ. When a glossary of legal terms was compiled by an Englishman, for use in the courts, seventy-five years ago, he was compelled to employ nine different kinds of script, as shown in the tabulation prefixed to his book.<sup>2</sup> There are many distinct religious groups, the largest two of which are in perennial conflict; and their religion is often bound up with their law.

Naturally, no one system of law obtains, or ever did obtain; but a variety of local and racial institutions. Naturally, also, there has been no intrinsic political coherence. Even today there remain in India some six hundred self-governing native states (apart from the area under direct vice-regal rule). The fact is, the peoples of India seem never to have been capable of self-determina-





## 1. Races

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tion as a political unit. Indeed, during the last 3000 years, India has been entered and dominated at least six successive times by immigrant alien races,—Indo-Aryans, Persians, Greeks, Turks, Mongols, English:

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### PERIODS OF IMMIGRANT RACES DOMINANT IN INDIA

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|                |                 |
|----------------|-----------------|
| 1. INDO-ARYANS | B. C. 2000+     |
| 2. PERSIANS    | B. C. 500       |
| 3. GREEKS      | B. C. 325       |
| 4. TURKS       | A. D. 1000-1400 |
| 5. MONGOLS     | A. D. 1400-1750 |
| 6. ENGLISH     | A. D. 1750+     |

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Of these races, the second and the third, the Persians and the Greeks, only took booty, and left no solid traces.

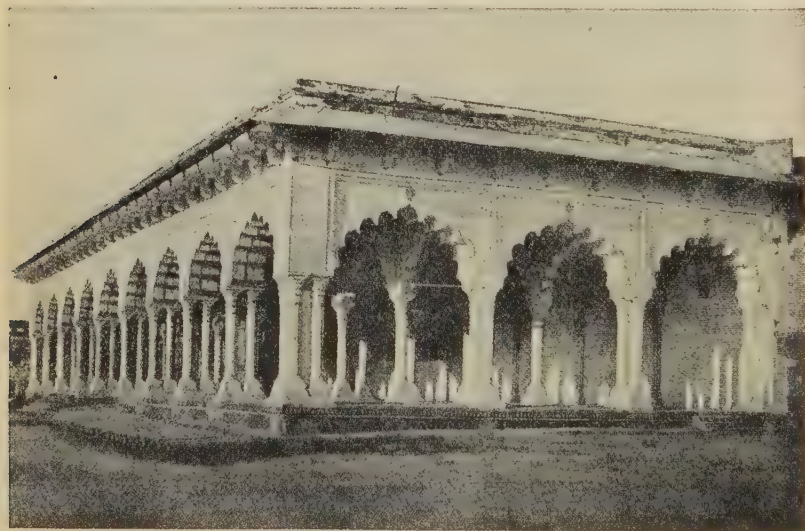
The fourth and the fifth races, the Turks and the Mongols, brought Mohammedan law, lived in jeweled magnificence, and developed in India the arts of architecture, sculpture, and painting,—the products of luxury and taste. The justice of these Mohammedan emperors was done in the Halls of Audience in their superb palaces; the Diwan-i-Am, or Audience Room, at Delhi is known as the “Westminster Hall” of Delhi.<sup>3</sup> The palaces of Delhi, Agra, and Fathpur, have been termed “dreams in marble, designed by Titans, and finished by jewelers”. And the Mogul justice, of its kind, though corrupt in some periods and places, was efficiently dispensed under many of their

## V. Hindu Legal System

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rulers. The Emperor Salim had a chain and bell attached to his own room in the palace, so that all who would appeal could reach him without running the gauntlet of the palace officials. Gibbon says, of the Emperor Timour, "Timour might boast that, at his accession to the throne, Asia was the prey of anarchy and rapine; whilst under his prosperous monarchy a child, fearless and unhurt, might carry a purse of gold from the east to the west."

But, of this dynasty, today only the palaces remain, as monuments to a vanished autocracy.<sup>4</sup> Their law is merely a branch of imported Mohammedan law (*post*, Chap. IX)



V. 3—AUDIENCE HALL AT DELHI

## 2. *Languages and Records*

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and is now in force only for their own believers—numbering, indeed, one-fifth of the present population of India.

The English race, the last to enter India, brought unity, liberty, and honest administration; but English law in India is mainly public law, preserving in private law the various native customs.

And so, of those six races of immigrants, the first, the Indo-Aryans, or Hindus, some 3000 years ago in origin, are the only race that developed a native system of law.

2. The records of this native system, in its two branches, the Brahman and the Buddhist, are contained



V. 4—HALL OF JUDGMENT AT AGRA

## *V. Hindu Legal System*

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in the Sanskrit and the Pali groups of languages, respectively. The classical language, commonly known as Sanskrit, is to medieval Pali and to modern Hindustani very much what Latin is to the Romance languages of Europe.

The old books and records were commonly made of strips of birch-bark or palm-leaf, inscribed with a sharp stylus, and bound in wooden or silk covers. Throughout India and the East Indian islands the palm-leaf, the birch-bark, and the bamboo filled the place taken by the papyrus in Egypt. The writing-instrument was an iron or stone stylus, and the script impression was then sprinkled with black powder, or otherwise treated to make it clear. The strips, measuring a few inches by a foot or more, were then strung together through holes at each end, in accordion-style. Some of the surviving remnants of this literary material date back towards the beginning of the Christian era. After the arrival of paper, large sheets were used, and then folded in imitation of the ancient leaf-strips. As late as 1885 in Siam is found a court record,<sup>5</sup> inscribed with a white chalk pencil on black paper, sealed with a mud seal, and folded into these long narrow pages.

But many of the early edicts and formal records were inscribed on stone slabs or on copper or gold tablets. The earliest legal document extant in pure Sanskrit is a royal



## 2. Languages and Records

land-grant of B. C. 23, inscribed on copper.<sup>6</sup> Its phrases reveal the Indian variants of forms of conveyancing which will be appreciated by the modern lawyer:<sup>a</sup>

[*Oldest Sanskrit Deed, B. C. 23.*] “[After a preamble reciting the virtues and conquests of the grantor-prince,] To all the inhabitants



### V. 5—SIAMESE COURT RECORD

The narrow oblong shape of the paper-leaf-folds is a relic of the earlier use of palm leaves strung together, accordion-style. At the top is shown the document's exterior, in the middle, a page of the opened document, below, the seal-stamps authenticating it.



## 2. *Languages and Records*

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of the town of Mesika . . . [naming other districts]; to the keeper of the elephants, horses and camels, to the keeper of the mares, colts, cows, buffaloes, sheep, and goats; . . . to the different tribes [naming them], to all our other subjects not here mentioned; and to the inhabitants of the neighboring villages, . . .

“Be it known that I have given the above-mentioned town of Mesika, whose limits include the fields where the cattle graze, above and below the surface, with all the lands belonging to it, together with the mango and modhoo trees, all its waters, and all their banks and verdure, all its rents and tolls, with all fines for crimes and rewards for catching thieves. In it there shall be no molestation, no passage for troops, nor shall any one take from it the smallest part. I give likewise everything that has been possessed by the servants of the Rajah. I give the Earth and Sky, as long as the Sun and Moon shall last. Except, however, such lands as have been given to God, and to the Brahmans, which they have long possessed and now enjoy. And that the glory of my father and mother, and my own fame, may be increased, I have caused this edict to be engraved, and granted unto the great Botho Bekorato Misro, who has acquired all the wisdom of books, and has studied the Vedas under Oslayono, who is descended from Opomonyobo, who is the son of the learned and immaculate Botho Borahorato, and whose grandfather was Botho Besworato, learned in the Vedas and expert in performing the sacrifice.

“Know all the aforesaid, that as bestowing is meritorious, so taking away deserves punishment; wherefore, leave it as I have granted it. Let all his neighbors, and those who till the land, be obedient to my commands. What you have formerly been accustomed to perform and pay, do it unto him in all things. Dated in the 33d year of the era and 21st day of the month of Margo.

“Thus speak the following stanzas from the book of Justice:

1. ‘Ram hath required, from time to time, of all the Rajahs

## V. Hindu Legal System

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that may reign, that the bridge of their beneficence be the same, and that they do continually repair it.

2. 'Lands have been granted by Sogor, and many other Rajahs, and the fame of their deeds devolves to their successors.

3. 'He who dispossesses any one of his property, which I myself, or others, have given, may he, becoming a worm, grow rotten in ordure with his forefathers!'"

It will be noted that the form of this deed illustrates the rule recorded centuries later by Yajnavalkya, one of the famous law-commentators, in these terms:

"Let a king, having given land, or assigned revenue, cause his gift to be written, for the information of good princes, who will succeed him, either on prepared cloth, or on a plate of copper, sealed above with his own signet; having described his ancestors and himself, the dimensions or quantity of the gift, with its metes and bounds, if it be land, and set his own hand to it, and specified the time, let him render his donation firm."

Another land-grant, about 1000 years later,<sup>7</sup> also on copper (the hole shows where a spike fastened it), employs equally technical phraseology, with local color peculiar to India:<sup>b</sup>

[*Sanskrit Deed, about A. D. 950.*] "The illustrious king Indrapala [reciting his titles and virtues] may he prosper!

"With reference to the land bearing four thousand measures of rice, and lying by the side of the land belonging to the Bhavisa of the hamlet of Kasi, situated within the district of Hapyoma, in the northern part of the country, he sends his greetings and commands to all who reside near the afore-said fields, viz., the accountants,







## V. *Hindu Legal System*

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traders and other common people of the district, as well as those who hold the rank of Raja, Rajni, Ranaka, and others, such as Rajanyas, Rajaputras and Rajavallabhas, and all who may hold any rank from time to time:

“Be it known to you, that this land, together with its houses, paddy-fields, dry land, water, cattle-pastures, refuse-lands, etc., of whatever kind it may be, inclusive of any place within its borders, and freed from all worries on account of the fastening of elephants, the fastening of boats, the searching for thieves, the inflicting of punishments, the tenant’s taxes, the imposts for various causes, and the pasturing of animals such as elephants, horses, camels, cattle, and buffaloes, as set forth in this charter: . . . . .

“To the Brahman Desapala . . . [reciting his lineage] who is austere and observes difficult ordinances, that land, as set forth in this charter, is given by me in the eighth year of my reign.

“Its boundaries are as follows: On the east, there are the Makkhi-path to the granary with the pond in front of it, and an embankment, also the Hasi of the Makkhi-path established by the still extant edict engraved on the Kuntavita pillar, and the ridge of the fields. On the south-east of the land, there are the hamlet of Kasi on the Kuntavita Lakkhyava property, and, along the boundary of the land, the big dike. On the south, along the boundary of the land, is the big dike. At the bend to the north and west, there are the big granary on the property of the Svalpadyati fishermen, and along the boundary of the land, the ridge of fields, also three clumps of bamboos. On the south-west, along the boundary of the land, there is the river Digumma. At the bend to the north, along the boundary of the land, there is the same river. At the bend to the east and the north, there are the granary belonging to the hamlet of Kasi, and, along the boundary of the land, the ridge of the fields. At the bend to the west, along the boundary of the land, there is a row of houses. On the west, there is the river Digumma. On the north-west, there is the same river. On the north, there are

## 2. *Languages and Records*

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the Bhavisa with the still existing charter of the holy Aditya [Sungod] made by Tathagata, and, along the boundary of the land, a walnut tree on a dry spot on the ridge of the fields, on the south side of the tank made by Pacupati, as well as a ridge of fields. On the north-east of that land, there are the granary, with the Makkhi-path and the pond in front of it, as well as an embankment. [Then follows the seal, and an ascription to the king.]”

The form of deeds in use for ordinary grantors was thus described in one of the commentaries of the late 1700’s, based on a text of a thousand years earlier:°

[*Jagannatha’s Rules for Conveyancing.*] “‘Land is conveyed by six formalities,—by the assent of townsmen, of kindred, of neighbours, and of heirs, and by the delivery of gold, and of water.’

“The form of the writing should be this: in place of the creditor’s name, let the donee’s be written, and the names of his father and so forth, to prevent a mistake of the person; next should be written, ‘this deed of gift, as follows: for the sake of heaven I give unto thee, with gold and water, this land, measuring so much, and exceeding the necessary subsistence of my family, to be held for such a period.’ If the townsmen and the rest be not witnesses to the deed, or if they be not present, the instrument should express, ‘with the approbation of the king, and with the assent of sons,’ and so forth. Though the consent of sons be not required in a gift for religious purposes, it should nevertheless be noticed (on account of the difficult publicity of a gift of immoveable property, which has been remarked by Sages) that himself and his descendants may not claim ownership. The year, month, fortnight, and day should be noted; and the donor should subscribe his name with his own hand, first writing the designation of his father and so forth. The names of witnesses, informed of the whole contents, may be subscribed by another hand, after asking their permission; but the writer’s name

## *V. Hindu Legal System*

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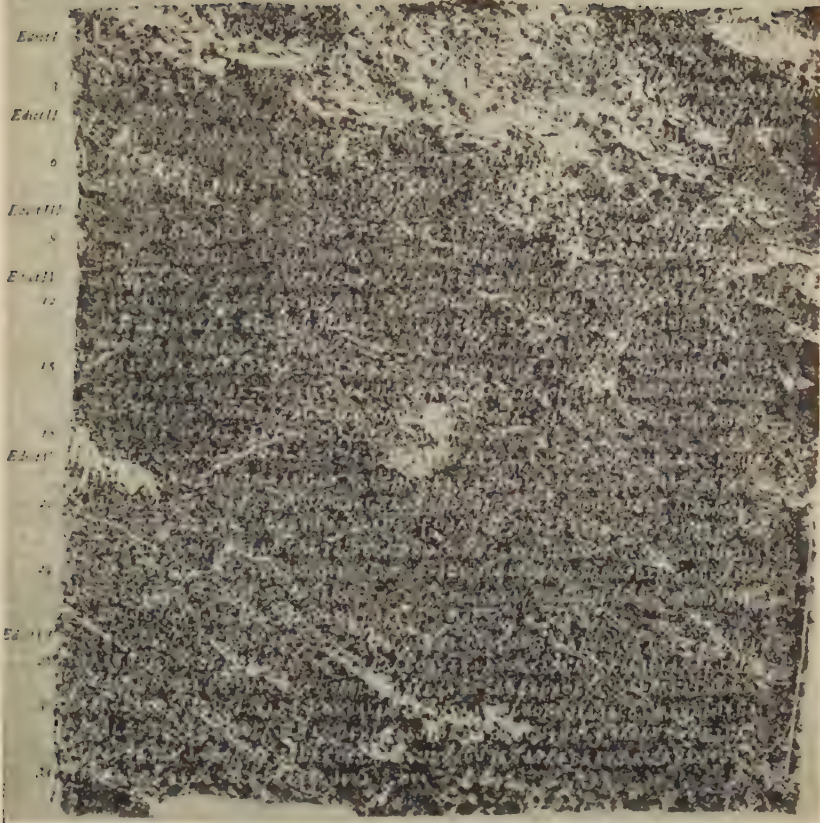
must be added. If any party be unable to write, the instrument should be subscribed by a substitute; but the donor, if unable to write, makes some mark, as a double line, or the like. Such is the practice."

### (II) THE BUDDHIST BRANCH

The Brahman branch of the Hindu legal system, though it finally came to dominate, was at first probably not more than the literary possession of the priestly class in the Aryan principalities.

3. Meanwhile, prior to the Christian era, the Buddhist branch had arisen and spread widely. Its active spread dates from about B. C. 250, propagated by the edicts of King Asoka,—often termed the Constantine of Buddhism. Asoka's grandfather, Chandragupta, king of Magadha, a region of the east, had extended his rule over all the north and west. This was shortly after the retreat of Alexander the Greek's invasion; and now, for the first time, in the history of India, there was a single authority from Afghanistan to Bengal, from the Himalayas to the center of the Dekkan,—the mightiest throne then existing in the world.

The grandson, Asoka, who came to the throne about B. C. 270, promulgated thirty or forty edicts, engraved on stone.<sup>8</sup> Asoka's edicts were composed in the Magadha script, a script older than Sanskrit; they represent the



V. 8—KING ASOKA'S EDICT, B. C. 250

The Sixth Edict deals with the king's administration of justice.  
"Complainants may report to me at any time, whether I am at  
dinner or in the harem or in my carriage or in my garden"



## V. Hindu Legal System

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earliest extant law records of India. In Edict VI the King speaks thus on the administration of justice:<sup>d</sup>

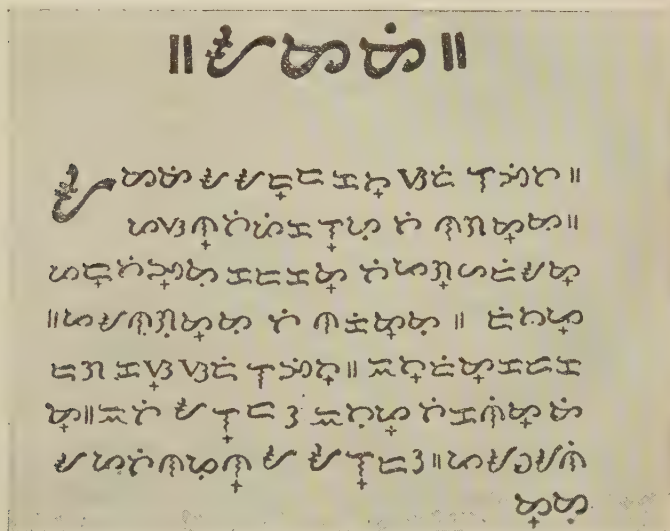
[*King Asoka's Edict.*] "King Asoka, beloved of the gods, speaks thus: . . . . . Complainants may report to me the concerns of the people at any time, whether I am at dinner or in the harem or in my carriage or in my garden . . . . . and any dispute or fraud shall be brought forthwith to my notice. For I am never satisfied with my exertions in the despatch of business. There is no more important task for me than the welfare of all people: but the root of that is exertion in the despatch of business. And I strive to discharge the debt which I owe to the world . . . . . This edict has been inscribed on stone, that it may endure forever."

Most of Asoka's edicts are short tracts, expounding and propagating his system of moral law, or "dhamma", founded on the preaching of Sakya (Buddha), some two centuries earlier. This term "dhamma" (like "maat" in Egyptian, "fas" in Latin, and "themis" in Greek) had a broad inclusive import; it meant "righteousness", "good form", "duty", and as Buddhism developed—the religion embodying Asoka's philosophy of life—the term "dhamma" came to include the meaning "Law". The new moral-religious system spread slowly over India. "Everywhere" said Asoka's thirteenth Edict, "men conform to the instructions of the king as regards the Dhamma; and even where the emissaries of the king go not, there, when they have heard of the king's Dhamma, the folk conform themselves, and will conform themselves, to the Dhamma precepts".



#### 4. *Buddhist Law*

4. The new Buddhist system, carried in the Magadha script used by King Asoka, penetrated even beyond India, into Burma, Siam, Tibet, China, and the East Indian Islands. This Magadha script, indeed, was found as late as A. D. 1650 in the Philippine Islands, used for the Tagalog language.<sup>9</sup> For in southeastern Sumatra had arisen, about



V. 9—FILIPINO SCRIPT OF A. D. 1650  
This script is founded on the Magadha script used by  
King Asoka B. C. 250

A. D. 700, the Buddhist colonial kingdom of Sri-Vishaya, whose domains finally extended to the Philippine Islands (where the tribal name "Visaya" still bears witness to its remnants). Later, about A. D. 1300, the kingdom of

## *V. Hindu Legal System*

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Madjapahit, originating from a Brahman colony in Java, overthrew the Sri-Vishaya power, took control of the Philippines, and lasted for about two centuries. The Mohammedan invasion did not begin until this period. So that the basis of the Malayan civilization for several centuries was the Buddhist-Brahman religion and law. At the time of the Spanish discovery of the Philippine Islands, not only were the more advanced tribes using the Hindu syllabaries for writing; but also their mythology, folklore, politics, customary law, and general literature had a distinct Indian cast.

This Magadha script of King Asoka, in a more developed form known as Pali, had become the repository of the Buddhist laws of Burma, Ceylon, and Siam: and the laws of those countries came to represent a modified Brahman-Buddhist system.

5. In Burma, the Buddhist religion and law, carried by missionary monks, came into official dominance after about A. D. 1100. From that period, and during the next seven centuries, at intervals, is found a succession of law-books, first in Pali and later in Burmese, forming a continuous chain of systematic tradition in dogma, custom, and precedent.<sup>10</sup> The authors were sometimes Buddhist monks, sometimes royal ministers or judges; and the basis of all was Buddhism, in perhaps its purest surviving form;

ပြာဟ္မဏတို့အဘယ်ကိစ္စရှိ၍ရောက်သနည်း။ သုခဗိနိဖြစ်သောသူ  
 ငယ်မေးသော်၊ ဆိုခဲ့ပြီးသမျှစကားအတိုင်းနှစ်ဘက်သားတို့အကုန်  
 ပြောကြဏေသည်။ သုခဗိနိဖြစ်သော သူငယ်ဆိုသည်ကား။ သင်  
 ပုဏ္ဏားလေးယောက်တို့၊ သည်တွင်နေ။ တောသွားလေးယောက်တို့  
 အဝေးအရပ်လေးမျက်နှာမှာနေကြလေဆို၍ နေကြလေ၏။ ထိုမှတ  
 မျက်နှာသားကိုမေးသည်ကား။ ဤကမ္ဘာတည်စက၊ မုသာဝါဒမဆို  
 သည်ဖြစ်၍ ဆင်းရဲ ခြင်းမရှိ။ သေသော်လည်း နတ်ရွာသို့ရောက်  
 သည်။ မဟုတ်သည်ကို ပြောဆို ဈေးက၊ ဤဘဝ၌ လည်းဆင်းရဲ  
 သည်။ ဘဝပြောင်းလည်း ငရဲမလွတ် ခံရချေသည်။ မှန်ရာပြောရ  
 မည်၊ မေးလျှင်၊ ခွေးချီ၍ ပြေးသည်၊ လိုက်သည် မရပါဟု၊ ပြောဆို  
 သည်။ အဘယ်အရပ်သို့ပြေးသနည်း ခွေးအမွေးကား အဘယ်သို့  
 နည်း၊ မေးသည်ကို၊ အရှေ့အရပ်သို့ ခွေးမြူချီ၍ ပြေးသည်ကိုဖြင့်ပါ

V. 10—DHAMMATHAT (LAW-BOOK) OF BURMA  
 Dhammathat was the generic name for the Buddhist law-books of  
 Burma; they date all the way between A. D. 1100 and 1800

## V. Hindu Legal System

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yet the mythical sage Manu (specially sacred to Brahmanism) was claimed as the primal authority.

The usual generic name for these law-books was Dhammathat. The following passage from a modern Dhammathat recounts the king's discovery of the wise judge, the ideal dispenser of justice in all primitive legend,—the Solomon who detects false witnesses; here he showed his shrewdness by requiring them to tell their stories separately, the very same expedient which made Daniel famous as a judge in exposing the conspiracy against Susanna:<sup>e</sup>

[*The Dhammathat of Burma—The Wise Judge Discovered.*]  
“In the country of Maha Thamada, four Bramins had by begging obtained one hundred tickals or pieces of silver money. They had not got four hundred, so they left the younger Bramin to watch the one hundred, and the three elder having gone off begging, four bee-hunters, who were going to the jungle, were consulted with by the younger Bramin, ‘to divide the one hundred pieces of money equally amongst them, and when the elder Bramins return and demand it, I [the young Bramin] will say, A dog ran away with it; and do you bee-hunters say you saw it.’ After they had thus consulted, the three elder Bramins returned. They said, ‘We have now procured four hundred pieces of money. Do you keep the one hundred pieces left in your care; we will each take one hundred’. The young Bramin then said, ‘My three friends, share your money with me. That left with me, being placed in one bundle in a cloth used for tying up meat and fish, a dog ran away with it, and it was lost. Though I followed with four bee-hunters, we could not recover it’. This the young Bramin said, and when they came to the head man of the town for his decision and stated the case as above, he ex-

## 5. *Burmese Law and Justice*

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amined the four men who were going to the jungle; they all said they also had followed the dog when he ran off. On the evidence of the witnesses he decided that the young Bramin had not secreted it, that it should be considered as lost, and the elder Bramins should share with the younger.

“The elder Bramins were not satisfied; but when they went to the ministers of the king, they gave the same decision; and when still dissatisfied, they went to the heir apparent; he gave the same. Still unsatisfied, they went to the first queen, who decided the same. They went to the king, and he also confirmed the decision. Yet still dissatisfied, they consulted with the young Bramin and the four bee-hunters, saying, ‘Wherever we have gone for a decision of our cause, it has been given against us. In a certain village, a boy decides all cases, and if his decisions are correct, the Nats [deities] of the forest, the hills, the trees and the earth, men and birds, cheer and applaud; if they are not correct, they do not applaud. Have you also heard this?’ The others replied, they also had heard it; and on this agreed that they would be satisfied with this young man’s decision.

“Making a declaration to that effect, they went to him. They reached his place of abode in seven months, and enquiring for him at the house, were told he had gone out with his father to the plough. Following there, they saw him. Having left his father, he bathed and washed the mud off his feet and body. ‘These Bramins who have come must have some dispute to decide’. Thinking thus, he put round him his father’s cloak which happened fortunately to be at hand, and breaking a branch from a tree, spread it and set down under the shade. The little wise man then said to the Bramins, ‘Oh! my friends, on what business have you come?’ The two parties then told him the case as it had happened. The young wise man then said, ‘My friends, you four Bramins remain here, and you four jungle-rangers go to a distance of four separate places’, and they did so.



## *V. Hindu Legal System*

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“He then examined one of the hunters, saying, ‘At the commencement of this world, as there was no lying, there was no misery, and at death people went to the Nat country. When they began to speak falsely, there was misery in this life; but when they changed this state of being, they could not escape hell, but had to endure. Ye must speak the truth.’ So on questioning him, he said they followed the dog on his running away, but could not catch him. The young man enquired in what direction the dog had run, and what was his color. The witness replied, he saw a white dog, and he ran east. On questioning another in the same way, he replied a red dog had run south. And on questioning another, he said a black dog had run west, and the fourth said a spotted dog had run north. Before examining the four, he had explained to them good and evil, and made them declare that they would speak the truth. He now said, ‘they have conspired to cheat, and concealed the money; let them be taken to the king of the country.’ As they were afraid to go before the king, and the money they had taken was still by them, he caused them to dig it up from where it was hid and return the full amount . . . . .

“When the Bramins represented to the king that their case had been decided, he enquired by whom the decision had been given, and saying, he certainly is a man of unparalleled wisdom, he sent for the young man and appointed him minister. When the king appointed him to try all the causes he said: ‘O king! I am afraid to undertake the decision of all the cases in the country’ . . . . No man is free from mistakes. I am not equal to the task.’ So he begged to be excused. The king, having fixed a certain term in years and months, begged him to undertake it. So making his obeisance to the king he agreed to enter the law-shed and decide causes for seven days, and requested to be allowed to consider the old and true road of former decisions. So he was permitted to consider.”

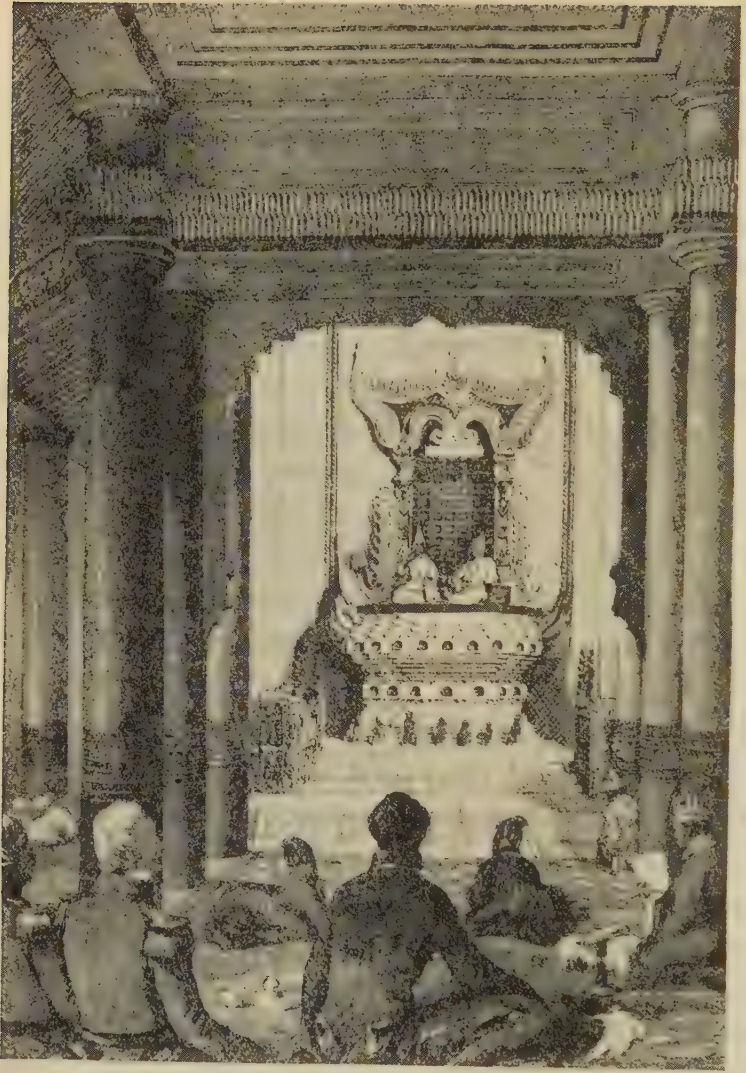
Burma appears in history as a kingdom united more

## 5. *Burmese Law and Justice*

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than once under a single autocratic ruler, with the capital at Pegu (or Ava). Travelers were always impressed with the superb royal display at Pegu,—the long moat full of crocodiles, the watch-towers, the gorgeous palace, the great processions of elephants, the shrines of gold and gems, the vast array of armed men, and the king himself on his throne. The king's audience of justice<sup>11</sup> is thus described by a Venetian merchant in A. D. 1569:<sup>f</sup>

"He sitteth up aloft in a great hall, on a tribunal seat, and lower under him sit all his barons round about. Then those that demand audience enter into a great court before the king, and there set them down on the ground forty paces distant from the king's person, and amongst those people there is no difference in matter of audience before the king, but all alike. And there they sit with their supplications in their hands, which are made of long leaves of a tree . . . . and with their supplications, they have in their hands a present or gift, according to the weightiness of their matter. Then come the secretaries down to read these supplications, taking them and reading them before the king. And if the king think it good to do them that favour or justice that they demand, then he commandeth to take the presents out of their hands; but if he think their demand be not just or according to right, he commandeth them away without taking of their gifts or presents."



V. 11—AUDIENCE AT THE COURT OF BURMA

## 5. *Burmese Law and Justice*

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But the Burmese king's justice was not always personal. Since the 1200's—the period of one of the earliest law-books—a Supreme Court (for both judicial and executive business) had been developing; it was known as the “Hluttaw Yon”. A senior prince presided, when the king did not attend; and it is recorded that though he might capriciously dismiss the judges, he rarely repudiated their decisions. The procedure of this court in the early 1700's is described by an observant English trading captain, Hamilton, who spent more than thirty years in the East Indies:<sup>g</sup>

[*The Supreme Court, in Burma.*] “The south gate of the palace is called the Gate of Justice, where all people that bring petitions, accusations, or complaints, enter . . . . All cities and towns under this king's dominions are like aristocratical commonwealths. The prince or governor seldom sits in council, but appoints his deputy, and twelve councillors or judges, and they sit once in ten days at least, but oftener when business calls them. They convene in a large hall, mounted about three feet high, and double benches round the floor for people to sit or kneel on, and to hear the free debates of council. The hall being built on pillars of wood, is open on all sides, and the judges sit in the middle on mats, and sitting in a ring there is no place of precedence. There are no advocates to plead at the bar, but every one has the privilege to plead his own cause, or send it in writing to be read publicly, and it is determined judicially within the term of three sittings of council; but if any one questions his own eloquence, or knowledge of the laws of equity, he may empower a friend to plead for him; but there are no fees but what the town contributes for the maintenance of that court, which, in their language, is called the Rounday, and



## *V. Hindu Legal System*

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those contributions are very small. There are clerks set at the backs of the judges, ready to write down whatever the complainant and defendant has to say. And the case is determined by the prince and that council, very equitably; for if the least partiality is found awarded to either party, and the king is made acquainted with it by the deputies at court, the whole sentence is revoked, and the whole board are corrected for it, so that very few have occasion to appeal to court, which they may do if they are aggrieved; and if an appeal is made upon ill grounds, the appellant is chastised, which just rigour hinders many tedious suits that arise where there are no penalties annexed to such faults."

6. In Siam, the same Buddhistic-Brahman religious-moral system obtained. It was a diluted and composite system; for in the course of history, first, some Indian invaders, in the early Christian era, had overrun the Indo-Chinese peninsula and imposed Brahmanism; and then the Buddhists, expelled from India, about A. D. 1000, immigrated and planted their rival form of religion and law during the next three centuries. The result was composite; the books of the Brahman law dealing with religion, caste, and administration were rejected, but the books dealing with civil and criminal law were preserved, sometimes textually. In the northeast, in Annam, Chinese ideas dominated. The whole peninsula was in fact a border-line region, where native institutions mingled in variant degrees with a superstructure ranging from Brahman-Buddhist ideas on the west to Chinese ideas on the east.



## 6. *Siamese Law and Justice*

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Each of these Indo-Chinese kingdoms—Siam, Cambodia, Annam—developed its administration of justice in its own individual fashion. In Siam, for example, a strange multiplicity of jurisdictions grew up. The region outside of Bangkok, the capital, was divided into three departments, each with its independent hierarchy of courts. Within the department a case went to four courts, each independent of the other; the first one could sanction the complaint; the second investigated the facts; the third passed upon the defendant's culpability; and the fourth imposed the sentence. This system, odd as it seems, nevertheless reveals a high degree of organization.

A realistic glimpse of the trial-methods in Siam in the early 1700's is given us by Captain Hamilton (above quoted), who was himself brought to trial there on a capital charge.<sup>12</sup> Hamilton, relying on an earlier treaty between England and Siam, had gone to that country to trade, but was not permitted to do so, owing to the intrigues of a crafty Persian agent of the English governor at a Burmese port, revoking the treaty. Hamilton's conversations with the Persian, protesting against this treatment, brought him into trouble, as he thus relates:<sup>h</sup>

[*A Trial for Treason, in Siam.*] "This Persian (whose name was Oia Sennerat) and I were discoursing one day of my affairs in the Industan language, which is the established language spoken in the Mogul's large dominions, and, among other things, I was laying

## *V. Hindu Legal System*

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down to him the difficulties that might attend the King of Siam's trade, carried on from Merjee to Fort St. George, because if the rest of the English colonies were forbid trading with Siam, they had just



V. 12—OLD AND NEW JUSTICE BUILDINGS IN SIAM  
Above is a view of the king's audience-hall in older days;  
below, the modern Ministry of Justice

## 6. *Siamese Law and Justice*

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cause to forbid his subjects to trade to Fort St. George, or anywhere else, and that other troubles might arise to the king's affairs, *by thus imposing on the king*, who was ignorant of the consequences that might follow in breaking the agreement made in England without so much as once giving warning to the English colonies of other parts of India. . . . .

"About a week after, I had a summons to appear before a tribunal, to answer to an indictment of speaking treason of the king. I knew myself innocent, and appeared at the time appointed, which was about eight in the morning. The court was held in a large, square, oblong hall, open on all sides. About nine the judge came with some thousands of attendants, and, as he passed by me to take his place, he viewed me very narrowly, as I did him with much attention. He was a man of a middle stature, about 50 years of age, of a pleasant but grave countenance, and had a quick sparkling eye. He spoke to my interpreter, to bid me have a care of my tongue, lest I should prejudice myself in answering to intricate questions. I thanked him for his admonition, and told him, 'A word to the wise was sufficient'.

"Having placed himself, he ordered my indictment to be read, which was accordingly done, and in about half an hour's time it was ended. He asked me by my interpreter, if I understood what was libelled against me. I answered, 'No'. He then bade the interpreter inform me of the meaning of each particular paragraph, as they were read a second time with deliberation, and, having heard my impeachment, which was grounded only on my saying, '*That the king had been imposed upon*', I thought fit to deny all, and put my adversary Oia Sennerat to prove that I had said so; but, by the bye, I found, that saying the King of Siam was capable of being imposed on, is rank treason.

## *V. Hindu Legal System*

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“The judge chose out of the assembly two procurators for each of us; and there were no small debates, for three or four hours, ‘Whether or not a stranger, who was ignorant of the laws of Siam, could come under the penalty annexed to the transgression of their laws, when they were broken through ignorance, and not with design;’ but my antagonist at last carried it in the affirmative, though the judge seemed to incline towards the opinions of my advocates.

“Then the judge put Oia Sennerat to prove what I was accused of, and he produced two of his own servants, who stood at some distance when we were discoursing of my affairs; but my advocates challenged the laws of Siam for their insufficiency, for that law admits not of a servant’s testimony, either for or against his master. Then he proffered to bring an undeniable witness against me, who was the only person with us when we discoursed, and that was Collison, who was presently sent for, and being set by my adversary, the judge asked him by the interpreter, if he was present at such a time, when Oia Sennerat and I were in warm discourse. He answered, he was. He then interrogated him, if he had heard me say in my discourse, that the king had been imposed on. He affirmed he had; on which I perceived a cloud overspread the judge’s countenance, and many others who had come to hear the trial seemed sorrowful.

“After a little pause, the judge, by the interpreter, asked me what I had to say to Collison’s evidence. I answered, that I had little knowledge of him, but that he might be an honest man, or otherwise, as his interest led him. All continued mute for a little space, and I broke the silence by desiring the judge to ask Collison in what language I held that discourse with Oia Sennerat, which the judge did, and was answered, that he did not well know, but that he believed it was in the Industan language. I begged the judge to ask him if he understood that language, and he did so. Collison, after



## 6. *Siamese Law and Justice*

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some pause, answered, 'No'. Then the judge asked him angrily, and with an air of disdain, how he could come in as evidence of words spoken in a language that he did not understand, and he simply said, that he thought I had said so; at which the whole crowd gave an huzza, and clapped their hands, and seemed joyful. The judge reprimanded Oia Sennerat for putting him and the court to so much trouble, and complimented me on my safe delivery, and so departed seemingly well satisfied.

" . . . . . When the judge came, some executioners had followed him with their instruments of death, to put the sentence in execution as soon as the judge pronounces it. Our debates held so long, that it was near eight at night before we got home. Had I been cast in my process, my head had been a sacrifice to my adversary's resentment, and my ship and cargo to the much-injured



V. 13—SIAMESE MODERN SUPREME COURT, ABOUT 1920  
The three Occidentals, Messrs. James, Noel and Guyon,  
were the foreign legal advisers



## V. Hindu Legal System

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king, and, to sum up all, my ship's company had been the king's slaves. On my returning home victorious, I had the congratulations of all my friends, particularly the Chinese merchants, whose lives and estates might have been endangered by the like villainous informations."

Siam has in modern times (about A. D. 1900) reorganized its legal system on Romanesque models;<sup>13</sup> but historically it formed a by-product of the Buddhist-Brahman system of India. That such a reorganization need not mean an abandonment of historic legal ideas may be seen from the following semi-official comment:<sup>i</sup>

"The ancient laws of Siam are fortunately worded in very wide terms, and are elastic enough, with the exercise of a little ingenuity, to meet nearly all the requirements of modern conditions in this country. The importation of brand-new codes would doubtless make the work of the judges easier; but the advantages of working on a system known to the people for centuries are obvious. As substantial justice can always be meted out if the judges display ordinary intelligence and impartiality, the changes of the future are likely to be confined to the gradual amendment of the present ground-work."

6a. The missionary cult of Buddhism, expanding from India, had resulted in its domination in two sharply contrasted geographical regions,—the lofty ice-bound plateau-valley of Tibet and the vast plains of the pastoral tribes of Mongolia. In Tibet, the law became not merely nomistic (*post*, Chap. XI, Prologue), i. e. derived from divine command, but ecclesiastical, thus, the civil government was wielded by a priestly hierarchy, under a chief priest or Lama.<sup>13a</sup> In Mongolia, the spiritual primacy of the Tibetan chief Lama was recog-

## V. *Hindu Legal System*

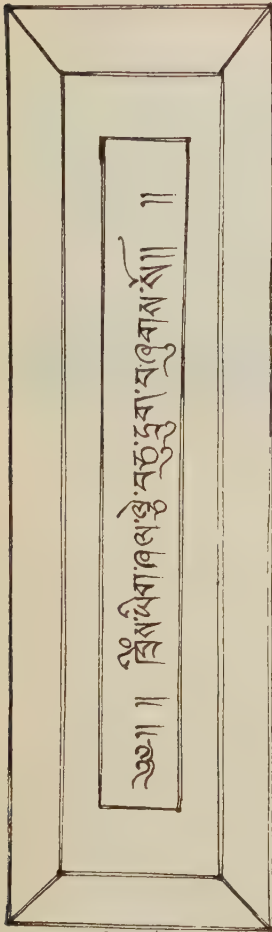
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V. 13a—"THE CASTLE-PALACE OF THE DALAI-LAMA OF TIBET"  
On this isolated rock in the city of Lhasa is the Dalai-Lama's Potala, or Castle-Palace.

nized, and the adoption of a code sometimes invoked the blessings of the priests; but the civil administration was always secular, and the customary law is found reduced to writing in various tribal codifications adopted at successive periods since the first Great Law (Yassa) of Jenghis Khan (A. D. 1206). In Sikkim and Bhutan, adjacent principalities in Himalayan India, whose peoples are Tibetan in race-stock and derive their law from Tibet, the hierarchy no longer rules. The Buddhist canons of Tibetan Lamaism, contained in two bulky compilations of several hundred block-printed volumes, the Kangyur and the Tangyur, seem to contain no civil precepts; but some separate works, chiefly the Book of Sixteen Laws,<sup>13b</sup> and the Book of Thirteen Laws, are used by the judges as books of instruction. In Nepal,

## V. *Hindu Legal System*



གཅིག་པུ་

V. 13b—THE SIXTEEN LAWS  
OF SIKKIM

The title-page, in Tibetan language, of the laws of Sikkim, founded on the Tibetan laws, the race-stock being the same.—The border-lines are in red, on the original, and the cover is bound in red silk.

at the northwestern corner of the Himalayas, where the race-stocks are mixed, the official law books for certain purposes are the Brahman Shastras; for the Gurkhas, the ruling class, are Brahmans. But the birthplace of Sakyamuni, the Buddha, was here, and Buddhism has so strong a traditional influence that one of the greatest international centers for Buddhist pilgrimage is here located; so that the tribal customary law, which has been partly reduced to writing, must show Buddhist influences.

7. But meanwhile, in India, between A. D. 400 and 700, a complete social and religious reaction took place. Buddhism was eradicated,—as some say, by Brahmanistic persecution; but the true cause is not yet agreed upon by scholars. At any rate, though Buddhism has spread over the entire east coast of Asia, it has virtually disappeared from India, its original home. After A. D. 800 in India, Brahmanism prevailed for all Hindus.

## 8. *Laws of Manu*

### (III) THE BRAHMAN BRANCH

8. The typical law-book of the Brahman-Hindu system is the famous Laws of Manu,<sup>14</sup> ascribed by tradition to Manu, the primitive author of this system, a pre-historic deity. This system was copiously cultivated, for twenty centuries, by the continuous speculations of

व्यवहारान्दिदृक्षुस्तु ब्राह्मणैः सह पार्थिवः ।  
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम् ॥ १ ॥  
तत्रासीनः स्थितो वापि पाणिमुद्यम्य दक्षिणम् ।  
विनीतवेषाभरणः पश्येत्कार्याणि कार्याणाम् ॥ २ ॥  
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः ।  
अष्टादशसु मार्गेषु निबद्धानि पृथक्पृथक् ॥ ३ ॥  
तेषामाद्यमृणादानं निक्षेपो ऽस्वामिविक्रयः ।  
संभूय च समुत्थानं दत्तस्यानपकर्म च ॥ ४ ॥  
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः ।

## V. *Hindu Legal System*

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several hundred priestly jurists, who produced thousands of volumes on law.

Perhaps the most marked peculiarity of this system was the Brahman-Hindu rules of caste. Even today are found more than eighteen hundred castes and sub-castes; there are fifty million people who are untouchable by other individuals. The law-book of Manu is founded on the principles of caste.<sup>1</sup>

[*Laws of Manu, Chap. I.*] "Par. 31. The Lord created, from His mouth, arms, thighs, and feet, the Brahman (holy man), Kshatriya (warrior), Vaisya (working-man), and Sudra (menial). . . . .

"Par. 87. Now, for the sake of preserving all this created world, the Lord ordained separate duties for those who sprang from His mouth, arms, thighs, and feet . . . . .

"Par. 93. The Brahman, since he sprang from the most excellent part, since he was the first-born, and since he holds the Vedas, is by right the lord of all this creation . . . . .

"Par. 100. Thus, whatever exists in the universe is all the property of the Brahman; for the Brahman is entitled to all by his superiority of birth."

This rigid law of castes exalted the priesthood, subordinated the artisan and the peasant, and enforced class-distinctions in an inhuman degree never elsewhere known in any of the world's legal systems.

The village communities, indeed, of the various tribes of India, by long tradition, were left largely to their own self-government; they had their own local judges, who



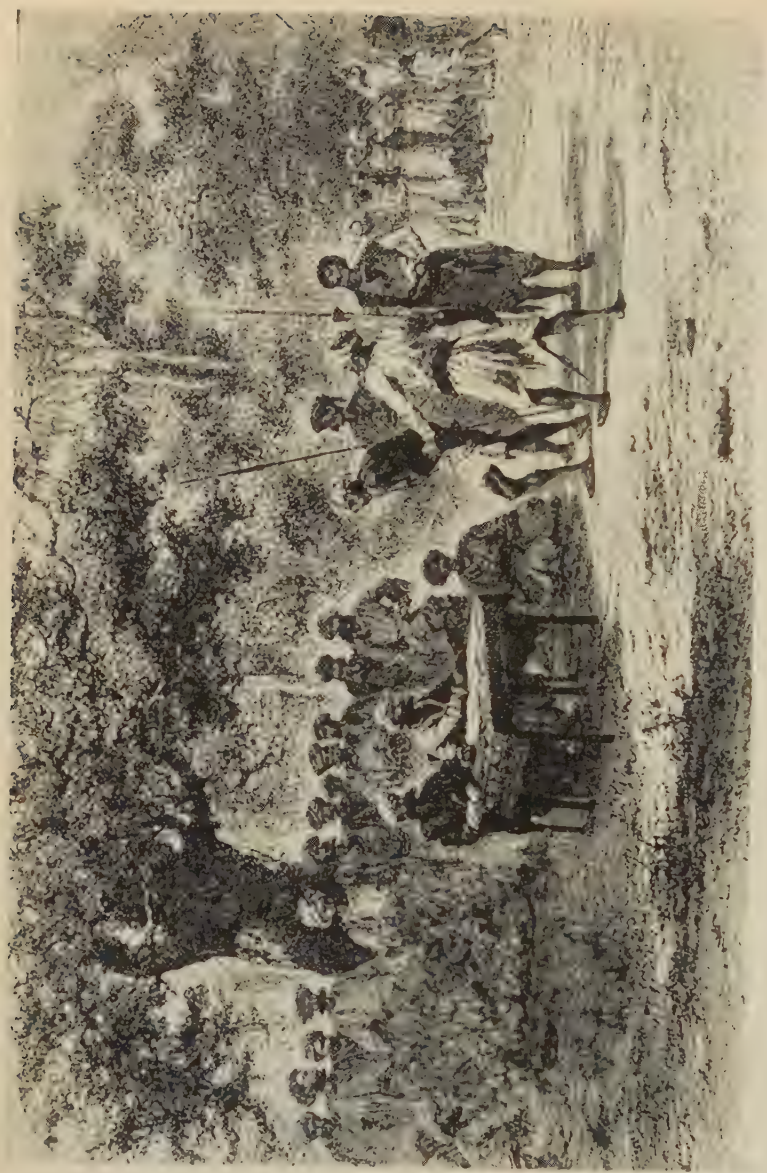
## 8. *Laws of Manu*

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interpreted their local customs, and these customs were the only law, in a large part of their daily life. We can re-construct these ancient village courts,<sup>15</sup> in imagination, from the surviving ones in the remote mountain districts, as an observant modern traveler has depicted them:<sup>k</sup>

"[*A Village Court.*] Colonel Erskine, the Commissioner for the Kumaon district, invited me to accompany him on his own official tour . . . . . It was a perfect education traveling with Colonel Erskine, for that shrewd and kindly old Scotsman had spent half his life in India, and knew the Oriental inside out . . . . . On arriving in a village he would call for a carpet, and a dirty cotton dhuree would be laid on the ground. He would then order a charpoy, or native bed, to be placed on the carpet, and he would seat himself on it, and call out in the vernacular, 'Now, my children, what have you to tell me?' All this was strictly in accordance with immemorial Eastern custom. Then the long line of suppliants would approach, each one with a present of an orange, or a bunch of rhododendron flowers in his hand. This, again, from the very beginning of things has been the custom in the East . . . . . Colonel Erskine was a great stickler for these presents; and as they could be picked off the nearest rhododendron bush, they cost the donor nothing.

"The outpouring of grievance and complaints then began, each applicant always ending with the two-thousand-year-old cry of India, 'Dohai, Huzoor!' ('Justice, my lord!'). The old Commissioner meanwhile listened intently, dictating copious notes to his Brahmin clerk, and at the conclusion of the audience he would cry, 'Go, my children, Justice shall be done to all of you,' and we moved on to another village. It was very pleasant seeing the patriarchal



V. 15—VILLAGE TRIAL SCENE

## 8. *Laws of Manu*

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relations between the Commissioner and the villagers. He understood them and their customs thoroughly; they trusted him and loved him as their official father. . . . (The Brahmin clerk was a very intelligent man, and spoke English admirably, but I took a great dislike to him, noting the abject way in which the natives fawned on him. Colonel Erskine had to discharge him soon afterwards, as he found that he had been exploiting the villagers mercilessly for years, taking bribes right and left.)"

The Brahman jurists, nevertheless, wove local custom, to a large extent, into their law-books; and hence, since the customs varied widely in different parts of India, there grew up four or five distinct sects, or schools, of Hindu legal thought, each covering the whole field of the law, but having special vogue in a different part of India (much as the Mohammedan law developed distinct schools in the widely distant regions of the Mohammedan world). But all of them based their speculations on the great original mythical law-teacher Manu, whose divine authority they recognized.

These jurists commented on the traditional texts of Manu and other early formulators of the law, and debated the views of other commentators, just as the Jewish rabbis developed their law by comparison of case-comments (*ante*, Chap. III). When the English came to govern India, they followed the earlier example of the Hindu princes and caused digests to be compiled from these various commentaries and schools.. One of the best

## V. *Hindu Legal System*

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known, compiled at the suggestion of Sir William Jones, was that of Jagannatha. (This eminent pundit in 1815 was still living, at the age of 108 years, surrounded by four generations of his descendants, numbering nearly a hundred, and lecturing daily to his pupils on law and philosophy.)

The method of his digest is illustrated in the following passage,<sup>1</sup> on a topic which comes into play in the English decision quoted later (the first three paragraphs are from the old texts):

[*Jagannatha's Digest, on Capacity to Convey.*] "NARADA. What has been given by men agitated with fear, anger, lust, grief, or the pain of an incurable disease; or for a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven. So must anything given by a minor, an idiot, a slave, or other person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed.

"MANU. 'Three persons, a wife, a son, and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.'

"VYASA. 'But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single coparcener may give, mortgage, or sell the immovable estate. . . .

[*Comment.*] "'A person not his own master;' a son, slave, or the like: so Vachespatis-misra, Chandeswara, Bhavadeva and Vachespatis-Bhattacharya.

"Here some remark that Misra and the rest have not explained the term as denoting one who is not owner, but have explained it



## 8. *Laws of Manu*

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'son, slave, or the like'; by which it is denoted that their meaning is this: a gift made by a person technically denominated not his own master is void. Persons so denominated are described by Narada, as cited by Vachespatis-Bhattacharya. If there be an unseparated brother, senior by age and virtue, and occupied in maintaining the whole family, a younger brother has no power to give or sell either share of the whole joint estate; therefore the gift or sale is void; but, a contract made by such an elder brother is valid for both shares.

"The father has not power to give or alien, for civil purposes, gems, pearls, land or the like, which have descended from ancestors, nor immovable property even though acquired by himself. . . .

"Thus they interpret the law; but that is not satisfactory; for it has been already answered. The gift even of the immovable patrimony, for religious purposes, is valid without the assent of sons and the rest; for excellent usage has legalized such donations, and no particular ordinance is found on this point: neither Vijñāneswara, nor any other author, expressly declares that property inherited from the paternal grandfather, and given by the father without the assent of the sons, is a void gift. Thus, in explaining the text, 'the father and sons have equal dominion, etc.' Vijñāneswara says, the son may oppose a father attempting to give away property inherited from the paternal grandfather. Therefore, persons not their own masters, as a son, slave, or the like, are mentioned because they are nearly connected with the owner; it might on that account be doubted whether their gifts be valid. There can be no question whether a gift made by a stranger be good in law; therefore it has not been noticed. . . .

"Women and the rest being dependent in all actions generally, even the gift of female property and the like, without the assent of the husband or master, is not valid."

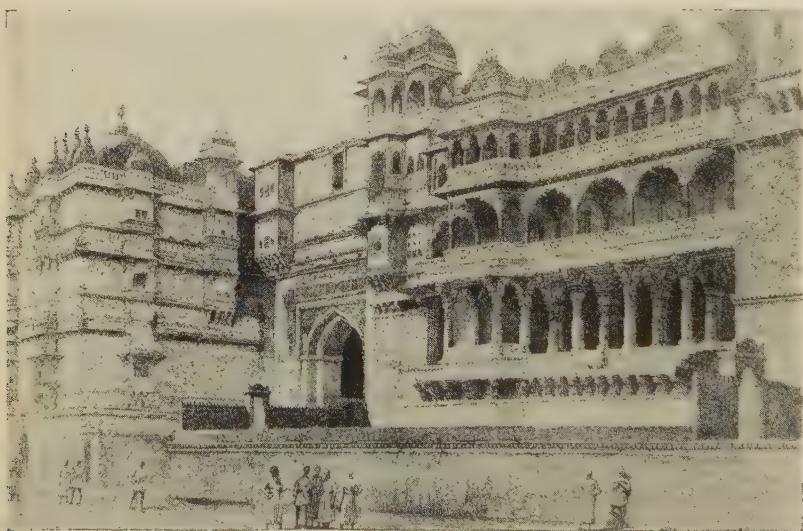
9. These priestly jurists were usually attached to the court of a maharajah, or prince; for India, up to the nine-



## *V. Hindu Legal System*

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teenth century, was a congeries of hundreds of principalities (and there are even today six hundred self-governing native 'states'); in each one ruled independently a maharajah. The kingdom of Udaipur, in Rajputana, represents the oldest, the proudest, and the purest Indo-Aryan stock; and their rajah, known specially as Maharana, or king, justly takes precedence of all maharajahs, princes, and chiefs of India; for his ancestor was the only Hindu prince who never submitted to the Mongol emperors. The rajah's palace at Udaipur<sup>16</sup> was a



V. 16—THE PALACE AT UDAIPUR

In this fortress-palace a household of seven thousand retainers was accommodated





V. 17—DURBAR, OR ASSEMBLY AT UDAIPUR

In the open court-yard in front of the palace was held the Durbar, to which in glittering jeweled ceremony came all the chiefs and vassals of the clan

## 9. *Brahman Procedure*

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fortress,—one of the many splendid structures raised all over India by the genius of those Hindu architects, the Jains, termed by the Hindus “magic-builders”. In this palace of Udaipur, a household of seven thousand persons was accommodated; for the Maharana maintained an enormous staff of officials, civil and military.

In the open court-yard in front of the palace was held the Durbar, or Grand Assembly, to which in glittering jeweled ceremony came all the chiefs and vassals of the clan; this was the nearest approach to a legislative parliament that developed under the native Hindu autocracy.<sup>17</sup> And yet we may suppose that in its way it rendered, for the personal autocracy of the Orient, the same service—a control by public opinion—that the Occidental representative assembly supplies. A testimony is found in a famous modern statesman’s eye-witness description of the Durbar at Chitral,—one of the secluded principalities in the Himalaya mountain region, where changes from ancient custom have been slowest:<sup>m</sup>

“[*A Durbar in Chitral.*] The government of Chitral was almost exclusively a personal government. The Mehtar [or, rajah] was supreme. He alone had the power of life and death. Theoretically, the whole property of the country belonged to him, and, in more than theory, he actually disposed of the persons and possessions of his subjects. For instance, he might and did give away men’s wives . . . . As Mehtar, he was supreme in judicial as well as

## *V. Hindu Legal System*

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in executive authority . . . . In these and in all similar exercises of authority the Mehtar was assisted by a Diwan-begi or Chief Minister, and by two or three wazirs or councillors, who were constantly in his company. There were usually also two aksakals (lit. white-beards) or elders in personal attendance upon him, and a number of chief men from outlying villages who visited the court in relays, and took turns of 'waiting' upon the Mehtar.

"A real and very efficient check upon any abuse (according to Chitrali standards) of the authority thus created was furnished by the publicity with which government and justice were alike administered. Did the Mehtar dispose of wives, or confiscate property, or assess fines, or sentence to death, in any sort of secluded Star Chamber, the system could not endure. But all was done 'coram populo' in open durbar, in the presence of the people, or of as many of them as chose to attend, and in the light of heaven. Chitral, in fact, had its parliament and its democratic constitution. For, just as the British House of Commons is an assembly in which nominally all members take an equal part, but where in reality the two front benches to a large extent conduct the business, under the eyes and subject to the possible animadversion of the remainder, so in Chitral, the Mehtar, seated on a higher platform, and hedged about with a certain dignity, dispensed justice or law in sight of some hundreds of his subjects, who heard the arguments, watched the process of debate, and by their attitude in the main decided the issue. Such durbars were held on most days of the week in Chitral, very often twice in the day, in the morning and again at night."

The justice of the king was in theory personal. It was partly done by sending judicial officials to go on circuit; but special classes of cases were reserved for the king's personal hearing and decision in the Audience Hall. The second hour, or period of the day, was set apart for his



## 9. *Brahman Procedure*

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judicial business; and if the modern Hindu passion for litigation is a race-inheritance, the hour of royal justice must have been a crowded one. As inculcated in the Laws of Manu, the king, when he entered the assembly-hall, and took the seat of justice to determine lawsuits, should be accompanied by three Brahmans learned in the Veda; he was then assured that his justice was divine; and divine Justice, or Dharma, says the book of Manu, is like a mighty bull, who, if obstructed or deceived, will avenge himself on king, judges, witnesses, or parties alike. (Some of the Hindu penal methods, employed in the justice of the native princes, were characteristic of the country; but it was here the elephant, not the bull, that symbolized an avenging justice.)<sup>18</sup>

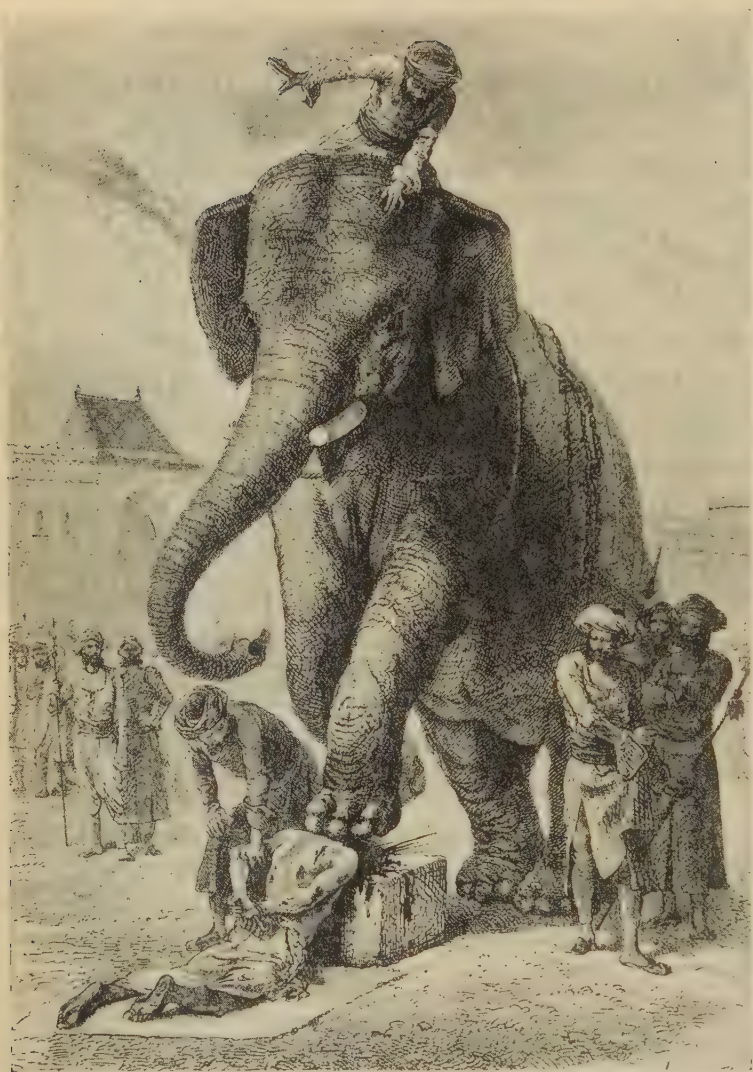
The procedure of this royal justice had received a full development. In a law-book by Brihaspati, about A. D. 600, the procedure is thus prescribed:<sup>n</sup>

[*Brihaspati's Rules for Pleading and Proof.*] "III. The Plaint.

1. The part called the declaration; the part called the answer; the part called the trial; and the part called the deliberation of the judges regarding the onus probandi: these are the four parts of a judicial proceeding.

"2. The plaint is called the first part; the answer is the second part; the trial is the third part; and the judgment is the fourth part.

"3. In the case of a denial, a judicial proceeding consists of four parts; likewise, in the case of a special plea; the same rule applies to



V. 18—EXECUTION BY ELEPHANT

This was only one of several forms of execution by elephant

## 9. *Brahman Procedure*

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a plea of former judgment; but in the case of a confession, it has two parts only.

"4. When plaintiff and defendant come together, each claiming to be first, their declarations should be received in the order of their castes, or after considering their respective grievances.

"5. Those acquainted with the true nature of a plaint declare that to be a proper plaint which is free from the defects of a declaration, susceptible of proof, provided with good arguments, precise, and reasonable.

"6. Brief in words, rich in contents, unambiguous, free from confusion, devoid of improper arguments, and capable of meeting opposite arguments.

"7. When a plaint of this description has been proffered by the plaintiff, the defendant should tender an answer conformable to such plaint . . . . .

"IV. The Answer. 1. When the plaint has been well defined, a clear exposition given of what is claimed and what not, and the meaning of the plaint fully established, the judge shall then cause the answer to be written by the defendant . . . . .

"8. One should not cause to be written an answer which wanders from the subject, or which is not to the point, too confined or too extensive, or not in conformity with the plaint, or not thorough enough, or absurd, or ambiguous.

"9. If the defendant confesses, he shall state his confession; in the case of a denial, he shall cause his denial to be written; and so should he record his special plea in an answer by special plea, and his previous victory in an answer by previous victory . . . . .

"V. The Trial. 1. When litigants are at issue in a court of justice, the judges, after examining the answer, shall adjudge the burden of proof to either of the two parties.

"2. The judges having heard both the plaint and the answer,

## *V. Hindu Legal System*

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and determined to which party the burden of proof shall be adjudged, that person shall substantiate the whole of his declaration by documents or other proofs.

"3. The plaintiff shall prove his declaration, and the defendant his special plea; victory in a previous trial shall be proved by a document recording that victory . . . . .

"5. One who absconds after receiving the summons; one who remains silent; one convicted of a crime by the depositions of witnesses; and one who admits the correctness of the charge: such are the four losers of their suit.

"6. One who absconds loses the suit after three fortnights; one who remains silent, after a week; and one convicted by the witnesses, or confessing his crime, all at once.

"7. He who announces witnesses and does not produce them afterwards, within thirty days or three fortnights, suffers defeat in consequence . . . . .

"17. Evidence is declared to be twofold, human and divine. Each of these is again divided into a number of branches by sages declaring the essence of things.

"18. Human evidence is threefold, as it consists of witnesses, writings, and inference. Witnesses are of twelve sorts; writings are declared to be tenfold; inference is twofold; divine test is ninefold.

"19. In the case of an answer of the first or third kinds, divine and human proof should be employed; but in the case of an answer of the fourth kind, an attested document recording the success of either party should be produced."

A special feature of Hindu remedial procedure (apparently akin to the racial development of practical psychic powers) was the method of moral or superstitious suasion, in which the injured person proceeded to

## 9. *Brahman Procedure*

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starve himself and thus compelled the wrongdoer to come to terms. Essentially religious in origin, and analogous to the curse of the Keltic Druids, the tabu of the Polynesians, and the suicide-threat (by "hara-kiri") in Japan, it occupied in India a more distinctive place in legal procedure; for it attracted the comments of many foreign observers, from Sir Henry Maine in modern times back through several centuries. Here is one form of it, as observed by a reliable Italian traveler about A. D. 1500:<sup>o</sup>

[*Procedure to Collect a Debt.*] "When any one ought to receive money from another merchant, there appearing any writing of the scribes of the king (who has at least a hundred of them), they observe this practice:—Let us suppose the case that some one has to pay me twenty-five ducats, and the debtor promises me to pay them many times, and does not pay them; I, not being willing to wait any longer, nor to give him any indulgence, shall take a green branch in my hand, shall go softly behind the debtor, and with the said branch shall draw a circle on the ground surrounding him, and if I can enclose him in the circle, I shall say to him these words three times: 'Bramini raza pertha polle'; that is, 'I command you by the head of the Brahmins and of the king, that you do not depart hence until you have paid me and satisfied me as much as I ought to have from thee.' And he will satisfy me, or truly he will die there without any other guard. And should he quit the said circle and not pay me, the king would put him to death."

10. The administration of the law in early and medieval Brahman India seems to have impressed favorably all observant travelers at various epochs. Diodorus of Sicily, for example, just before the Christian era, re-



## *V. Hindu Legal System*

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cords briefly that "their judges decide the lawsuits diligently, and deal severely with the offenders."<sup>p</sup> The geographer Strabo, writing about A. D. 20, and relying mainly on the recorded observations of Alexander's companions, three centuries earlier, found much to admire in Indian law (and he rarely noticed the laws of the many countries he described):<sup>pp</sup>

"All the Indians are frugal in their mode of life, and especially in camp. They do not tolerate useless and undisciplined multitudes, and consequently observe good order. Theft is very rare among them. Megasthenes, who was in the camp of Sandrocottus, which consisted of 400,000 men, did not witness on any day thefts reported which exceeded the sum of two hundred drachmae, and this among a people who have no written laws, who are ignorant even of writing, and regulate everything by memory. They are, however, happy on account of their simple manners and frugal way of life . . . . The simplicity of their laws and contracts appears from their not having many lawsuits. They have no suits respecting pledges and deposits, nor do they require witnesses or seals, but make their deposits, and confide in one another. Their houses and property are unguarded. These things denote temperance and sobriety . . . . Megasthenes says, that none of the Indians employ slaves. But, according to Onesicritus, this is peculiar to the people in the territory of Musicanus. He speaks of this as an excellent rule and mentions many others to be found in that country, as the effects of a government by good laws."

An Arab traveler, ten centuries later, declared emphatically:<sup>q</sup>

"Justice is a natural instinct among the inhabitants of India, and they hold nothing in equal estimation. It is stated that their

## 10. *Administration of Justice*

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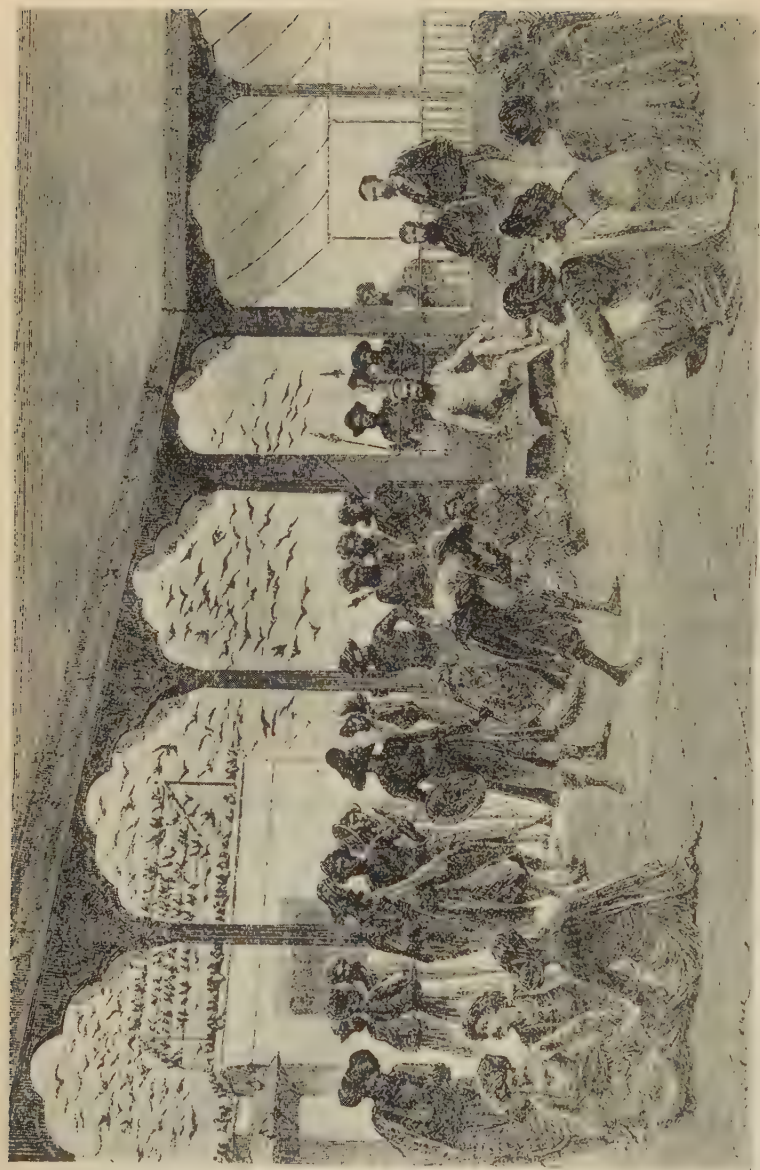
numbers and prosperity are due to their integrity, their fidelity in fulfilling engagements, and to the general uprightness of their conduct. It is, moreover, on this account that visitors to their country have increased, that the country flourishes, and that the people thrive in plenty and in peace."

And another Arab traveler testified:

"Security and justice are so firmly established in this city, that the most wealthy merchants bring thither from maritime countries considerable cargoes, which they unload, and unhesitatingly send into the market and bazaars, without thinking in the meantime of any necessity of checking the account, or of keeping watch over the goods."

But in later times, after British colonists and travelers had arrived, the picture is not so favorable. Bribery of officials and perjury of suitors are reported as undermining popular faith in the justice dispensed in the native courts. An English visitor of the 1700's thus describes the proceedings:<sup>r</sup>

[*Administration of Justice.*] "No man is refused access to the Durbar, or seat of judgment; which is exposed to a large area, capable of containing the multitude.<sup>19</sup> The plaintiff discovers himself by crying aloud, Justice! Justice! until attention is given to his importunate clamours. He is then ordered to be silent, and to advance before his judge; to whom, after having prostrated himself, and made his offering of a piece of money, he tells his story in the plainest manner, with great humility of voice and gesture, and without any of those oratorical embellishments which compose an art in freer nations.—The wealth, the consequence, the interest, or the address of the party, become now the only considerations. He visits his judge in private, and gives the jar of oil: his adversary



V. 19—THE GAIWAR OF BARODA HOLDING COURT

## 10. *Administration of Justice*

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bestows the hog which breaks it. The friends who can influence intercede; and, excepting where the case is so manifestly proved as to brand the failure of redress with glaring infamy (a restraint which human nature is born to reverence), the value of the bribe ascertains the justice of the cause.—This is so avowed a practice, that if a stranger should inquire how much it would cost him to recover a just debt from a creditor who evaded payment, he would everywhere receive the same answer; the government will keep one-fourth and give you the rest. Still, the forms of justice subsist; witnesses are heard, but brow-beaten and removed; proofs of writing are produced, but deemed forgeries and rejected, until the way is cleared for a decision, which becomes totally or partially favourable, in proportion to the methods which have been used to render it such; but still with some attention to the consequences of a judgment which would be of too flagrant iniquity not to produce universal detestation and resentment.

“Providence has, at particular seasons, blessed the miseries of these people with the presence of a righteous judge. The vast reverence and reputation which such have acquired are but too melancholy a proof of the infrequency of such a character. The history of their judgments and decisions is transmitted down to posterity, and is quoted with a visible complacency on every occasion. Stories of this nature supply the place of proverbs in the conversations of all the people of Indostan, and are applied by them with great propriety.”

An eminent French missionary of the early 1800's, after thirty years of intimate observation, recorded this opinion of the methods of justice in the Madras region:<sup>s</sup>

[*Quality of Hindu Justice.*] “Governed from time immemorial by despotic princes, who recognized no law but their own free will and pleasure, India has been accustomed to a form of judicial administration peculiar to herself. There has been no legal code,



## *V. Hindu Legal System*

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neither has there been any record of legal usage. There are, it is true, a few works containing general legal principles, and a few wise legal maxims which have helped to guide the judges in their decisions; yet nowhere have there been properly organized courts of justice. Ordinary cases have generally been settled, without any right of appeal, by the collectors of public revenue, assisted by assessors selected from the principal inhabitants and by the military officer commanding the district.

“The Hindus have neither barristers nor solicitors; neither are they compelled to submit to those long proceedings and interminable delays, the cost of which often equals the value of the matter under dispute. When it is a question of dividing property or of other business of any importance, it is generally submitted to the arbitration of relatives or of the headmen of the caste; and if the nature of the suit or the high rank of the litigants render it advisable, all the principal inhabitants of the district assemble to decide the point at issue.

“When a case is brought before the revenue officer of the district and his assessors, no difficulty is experienced in getting them to settle the dispute if they think that they are likely to make any money out of it. Otherwise they will easily invent some pretext for putting off the matter till some future time when they may have more leisure to attend to it. In any important case they try their best to bring the parties to an amicable understanding; and if that is impossible, they leave the decision to a ‘panchayat’, or tribunal of five arbitrators, which may be composed of a larger, but never of a smaller number than five. If caste customs are the subject of dispute, the settlement devolves upon the heads of the castes. The procedure generally followed is that dictated by common sense, by ordinary intelligence, and by such principles of equity as one always expects to find established, in theory at any rate, in all civilized countries. Besides, almost every member of a caste is well acquainted with its different customs, which are handed down by



## 10. *Administration of Justice*

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tradition from father to son, and thus are never lost. In short, the form of judicial procedure in India is less complicated than that of Europe, and would leave little to be desired if the scales of Themis were not much more easily put off their balance there than in other countries.

“Impartiality and disinterestedness are virtues with which Hindu judges have but a very slight acquaintance. Too weak to be able to resist the bribes that are offered them, or to be independent of the prejudices and predilections of their own circle, or to be above all considerations of personal interest, their judgments are rarely conspicuous for unswerving uprightness and integrity. Almost invariably it is the richer suitor who gains the day; and even the most guilty generally find some means of blunting the sword of justice. If the parties to a suit have an equally good case or an equally bad one, the party which makes the most noise and is loudest in its abuse of its adversary usually gains the day, for eloquence at the Indian bar consists in shouting with all the strength of one’s lungs, and in pouring such a flood of invective on one’s adversary that he has not an answer left.

“There are two or three Hindu works which contain rules and directions concerning the administration of justice, both civil and criminal . . . . . Many legal precepts and decisions, which would be most useful helps to a judge, might be gathered from these works; but, as usual, they are immersed in a farrago of nonsense, religious and otherwise. For instance, one may find there numbers of decisions in hypothetical cases that are either perfectly ridiculous or morally impossible, and also numbers of idiotic theses propounded ‘ex cathedra’. Furthermore, whatever valuable information may be found here and there in these books is quite beyond the comprehension of the majority of Hindus, who do not in the least understand the learned terms in which they abound . . . . .

“In civil as well as in criminal cases, when the evidence does not

## *V. Hindu Legal System*

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completely establish a fact, the Hindus often have recourse to ordeals to decide the point at issue. There are four ordeals generally recognized among Hindus, namely, by the scales, by fire, by water, and by poison. It is not the magistrates only who order these trials by ordeal. Anyone has the right to insist on such a trial. Thus, if a theft has been committed, the head of a household compels each member to undergo an ordeal. In the same way, the head of a village may force it upon all the inhabitants on whom criminal suspicion may rest; and a jealous husband may order the same in the case of his wife whose fidelity he doubts. These ordeals sometimes produce such an effect on the real culprits that they are convinced that discovery is inevitable, and think it more prudent to confess their guilt at once than to aggravate the matter by keeping silence. On the other hand, such ordeals often occasion deplorable miscarriages of justice, and result in the conviction of innocent persons, who, strong in the knowledge of their innocence, fondly believe that the natural course of things will be reversed in their favour . . . . .

“No doubt the disregard of the sanctity of an oath prevailing among the Hindus has, to a certain extent, necessitated the adoption of this system of trial by ordeal. Certain it is that there is no nation in the world who think so lightly of an oath or of perjury. The Hindu will fearlessly call upon all his gods—celestial, terrestrial, and infernal—to witness his good faith in the least of his undertakings; but should fresh circumstances demand it, he would not have the smallest scruple in breaking the word that he had so solemnly pledged. Woe to the imprudent person who confides to Hindus any private matter that affects his fortune, his honour, or his life! If it served their purpose, they would divulge it without any hesitation. The unscrupulous manner in which Hindus will perjure themselves is so notorious that they are never called upon to make a statement on oath in their own courts of justice, unless they are persons who bear an exceptionally high character.

## 10. *Administration of Justice*

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“But the jurisprudence of the Hindus, like the rest of their political institutions, has undergone a complete change since a great European Power has dominated the country. Regular courts of justice have been established at great expense in every district to protect the rights and settle the differences of persons of all classes, irrespective of rank, position, and caste. And this is, undoubtedly, one of the greatest benefits that a just and enlightened Government can bestow on any country.”

But in valuing the credit to be given to these variant opinions, four circumstances must be kept in mind (and they apply more or less to any alien observer's accounts of Oriental justice). In the first place, as to the extent of parties' perjury, few observers are qualified to pronounce a comparative judgment. An English trial judge, in 1895, who had long held court in India, thus recorded his opinion of the comparative prevalence of perjury in England and in India: “In India, no doubt, there was a good deal of lying, but many of the lies were of a stereotyped form (like fictitious averments in our pleading); and I certainly think it harder to get at the truth in an English local court than it was in a local court of North-west India.” In the second place, as to bribes (alias gifts) to judges, it must be remembered that the practice of suitors' gifts to court officers (the progenitor of our modern court fees) survived long in Europe; that in France as late as the 1600's all judicial officers purchased their posts from the king (the chief justice paid upwards of 500,000 livres)

## *V. Hindu Legal System*

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and reimbursed themselves from the suitors' fees; and that in the early 1700's an English Chancellor was impeached for selling the appointments to masterships in chancery in accordance with old custom. In the third place, in those countries of the Orient where the autocratic ruler dispensed personal justice, the quality of justice depended much on the ruler's personality, and therefore varied from reign to reign, between good and bad. And in the fourth place, in a country like India, composed of scores of extensive independent domains, the quality of justice varied in different regions.<sup>20</sup> Thus different observers might have different reports to make.

11. During the seven centuries of Mohammedan rule, over a large part of India this Brahman-Hindu law was more or less in abeyance; it obtained only as customs of the conquered race, ignored or barely tolerated; and fewer law books were written in this period. But when the English came to rule India, late in the 1700's, the Hindu law books were restored to full prestige (and for a while, as some maintain, to even a greater prestige than they had ever enjoyed under the native rulers). The Hindu pundits, or jurists, were called in to advise the English judges in all lawsuits dealing with Hindus. The manner of applying the Hindu law in the earlier English courts may be seen from the following decision, in the year



V. 20—AUDIENCE HALL AT MADURA



## V. Hindu Legal System

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1815; the rule of law here applied is expounded in the Hindu texts already quoted from Jagannatha's Digest:<sup>t</sup>

[*An English Judicial Opinion.*] "*Bishwa-nath Dutt versus Durga-prasad Dey and Shib-chander Dey.*"

"EAST, C. J.—This was an action of ejectment for some premises, containing altogether five Katas and fifteen Chhataks, with a dwelling-house at Arkuli in Calcutta, of which Nil-mani Dey, who died between nineteen and twenty years ago, was the patrimonial owner. It appears by the evidence of one of the family that Nil-mani, for the last two or three years of his life, had been insane and incapable of work, and that his wife was obliged to dispose of all his personal property in support of him and his family during his malady. At his death he left his widow Abhoya and three infant children, two sons, and an unmarried daughter. Those sons are the present defendants. At his death there was nothing left for the subsistence of his family but the property in question, and another small piece of ground, containing five Katas and a half, which he had purchased a short time before his derangement.

"The present lessor of the plaintiff claims under a deed of purchase, in reality from the widow, but nominally from her and her eldest son, both being parties to the deed, dated 15th Agrahayan 1203 B.S., nearly twenty years ago, for the price of Rs.218. It is not disputed that the price was fair at the time; and it appears to have been an open and avowed transaction; but it was also admitted that, at that time, Durga-prasad, the eldest of the two infant sons, and who was a nominal party to the deed, was only seven or eight years of age.

"The right, therefore, if any, of the widow to dispose of this property arose and was put upon the ground of necessity, for the support and subsistence of herself and her children. This formed the first and principal point which was made, and on which the opinion of the pundits was taken as follows:—

## 11. *Brahman Law Revived*

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“Question to Pundits: 1. Can a Hindu widow, having infant sons, sell the property of those sons to a stranger under any circumstances of want? Answer: She may, to preserve the children from want, and that without consulting the rest of the family. Q. 2. By what authority? A. 2. The *Daya-tattwa*, the *Daya-bhaga*, and the *Vivada-chintamani*. Q. 3. If there be a widow and brother of the father's side, and infant children, who is to manage for the family, whether divided or undivided? A. 3. If the family were undivided, the uncle of the children has the management. If divided, the widow has it, but in cases of emergency she will consult the relations of her husband. Q. 4. Suppose she sold the property without consulting those relations, would the sale be binding? A. 4. It is necessary for her to consult the relations; but if they refuse, then she may sell without their consent, as much as is necessary for the purpose. But she can, in cases of emergency, sell without. Those cases of emergency are, the subsistence of a child, the portion of a daughter, and a *shraddha*. Q. 5. If the widow have the means of subsistence from the support of the family, can she then sell the property? A. 5. Not so, if she have support.

“In addition to these opinions of our own pundits, we desired this case to stand over, in order to learn what the opinions of other pundits might be, as I had been informed that the same question was then actually pending before the Mofusil court of appeal, and that Mr. Watson, the judge, had desired the opinion of the Mofusil pundits to be taken upon the points: and I have been since informed, that, in the course of our last vacation, those opinions having been taken, were in conformity to the opinion of our own pundits; and that judgment was given accordingly by the court of appeal in favour of the widow's right to sell in cases of necessity.

“In truth, it seems that such a power is founded in necessity and good sense, in a country where there is no public provision for the poor; for otherwise it might happen that a child's life might be sacrificed for preserving his property.

## *V. Hindu Legal System*

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"The only question, therefore, which remains, is, whether the necessity, from which the power arises, did in fact exist in this case.

"On these grounds we think that the purchase was well made, and that there should be judgment for the lessor of the plaintiff, who had been in possession under the purchase-deed for nearly nineteen years before he was lately ousted by a judgment in ejectment snapped against him. Judgment for the plaintiff. 4th July, 1815."

12. Meanwhile, however, the Sanskrit language, the vehicle of these hundreds of volumes of Hindu law, had remained totally unknown to Europe. How completely shut off India had been from Europe may be realized from the circumstance that no European had ever seen an Indian sovereign face to face in official intercourse, from the time of Alexander the Great down to the arrival of the English commercial envoy in the time of James I,—an interval of nearly 2000 years. But in 1786, a young English lawyer, William Jones,<sup>21</sup> author of one of our earliest scholarly law-books, *Jones on Bailments*, but also an accomplished linguist, with a fondness for Oriental poetry, went out to India as a judge, in the government of Warren Hastings. Jones, browsing curiously among the native poetry, stumbled upon this elaborate law-book of Manu, written in Sanskrit.

His discovery thrilled his linguistic zeal; he translated it into English; it was published in 1794. His studies soon revealed to scholars of the western world the immense



V. 21—SIR WILLIAM JONES

## *V. Hindu Legal System*

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significance of the Sanskrit language; and the modern science of comparative philology, which now fascinates hundreds of the world's scholars, and the modern theory of a primitive Aryan race, which revolutionized our conceptions of ethnology, were the wonderful outgrowths of this young lawyer's enlightened curiosity.

Since his time, the beneficent British policy, in contrast to the ruthless despotic contempt shown for the Brahman law by the original Turkish and Mongol conquerers, is to let each people live according to its own traditions and customary law.

When the English first undertook to superintend the administration of justice in India, it was believed that the Hindu law-books, founded on the Brahman religious system, represented in all details the rules actually in force for the Hindu communities. But by the middle of the nineteenth century the truth began to be discovered that the local customs, especially in land tenure and inheritance, and the customs of castes, guilds, and families, were and always had been a principal, if not the prime source of local law; and that the religious law-books did not always reflect these customs, and were referred to (in some regions and on some topics at least) only as a secondary source,—somewhat as the classic Roman law-books were later used by the Germanic peoples of Europe.



## 12. *Hindu Law Under British Rule*

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Moreover, the Brahman pundits, in the composition of their books, were apt to write as chambered scholars seeking the logical perfection of the system; they pictured an ideal of the law as it ought to be, in Brahman conception; so that many parts of their law-treatises are speculative and fantastically unreal, elaborating rules which never could have been law in practice. (In this respect, the parallel is striking between their books and those of the Irish Keltic books, *post*, Chap. X, composed by the Brehons, or priestly jurists).

The controversy over the extent of the validity of the Hindu jurists' treatises has not even yet been fully settled. However, scores of them have been edited and translated and used in the courts, during the past hundred years; long series of decisions and ordinances have enforced their rules; and they now form the warp and woof of the private law for Hindus.

And that law is interpreted for the Hindu people largely by their own kindred. For example, in the judicial establishment of Bengal, including the High Court at Calcutta,<sup>22</sup> a modern civil service list showed that, out of some four hundred and sixty judges, only sixty were Englishmen, while four hundred were Hindus. And in the Law College of Calcutta University, the president of the college was a Hindu, and the English lecturers num-

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bered only two, while the Hindu lecturers numbered fifty-three.

Thus the rights of two hundred millions of Hindu population are still determined mainly according to the texts and customs of this Hindu legal system, which traces its origin back for 3000 years, to the ancient Aryan invaders,—the contemporaries of Moses, of Confucius, and of Ramses.



V. 22—THE HIGH COURT AT CALCUTTA

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## V. *Hindu Legal System*

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*Brian Hodgson*, "Miscellaneous Essays" (London, 1880; Vol. II, sec. XII, "Law and Legal Practice in Nepal").

*W. Brook Northen* (Major) and *C. J. Morris* (Capt.), "The Gurkhas, their Manners, Customs, and Country" [Nepal] (London, 1928).

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THE  
GREEK  
LEGAL SYSTEM



## Prologue to Chapter VI

Of the foregoing five earliest legal systems, the Chinese was the only one not founded on religion; in the Egyptian, the Mesopotamian, the Hebrew, and the Hindu legal systems, the law is conceived as revealed and imparted, through the ruler, directly from God, and therefore is a part of the dictates of religion. The later Mohammedan system was also of this type. With the Greeks, in their maturity, is first met a legal system that is secular, i. e. it is not conceived as a part of religion, emanating from a divine source.

The importance of this distinction, as affecting the scope and spirit of law, has been lucidly summarized by a modern scholar:<sup>aa</sup>

“The characteristic thing in Judaism at the beginning of our [Christian] era is not its resemblance to a church, but that it conceived itself as revealed religion, and drew all the consequences of this conception. God had not only made himself known to men, but had given them in his twofold law a revelation of his will for man’s whole life, and of the way of salvation through the fulfilment of his righteous and holy will . . . . .

“In this aspect Judaism falls into the same class with Zoroastrianism (the prophetic reform religion of the Iranians) and with the religions of India,—Brahmanic, heretical, and sectarian. Wherever, indeed, men have taken the idea of revealed religion seriously and logically, there a divine law, embracing not only what we call the principles of religion but their manifold application to all man’s

## *Prologue*

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relations to God and to his fellow-men, a law not only of rites and observances but for the civil and social side of human life, forms a large and fundamental part of the revelation. And partly under the necessity of new situations, partly by scholastic interpretation and casuistic development, it becomes progressively more comprehensive and more minute. As revelation, explicit or by clear implication, all this law has the same divine origin and authority; the infraction of even the seemingly most trivial prescription may be followed by incommensurable consequences, for it is not the trivial rule that is transgressed or neglected, but the unitary law of God which is broken.

"Such religions are often called 'nomistic', that is to say, religions founded on and concluded in a law (nomos) given by God. The important thing is not what we call them, but the recognition that this development is a logical consequence of the idea of revealed religion."

With the Greeks, then, and after them the Romans, we come to secular systems of law. These two, indeed, in their earlier stages retained remnants of divinely revealed authority; but in their developed stages had become secular. All the racial systems of later origin (except the Mohammedan, which followed the Semitic instincts of the Mesopotamians and the Hebrews) were secular in their sanction.

## VI

### *The Greek Legal System*

1. Greece in the Homeric Period—The Lawsuit on Achilles' Shield—Themis—Greek justice not theocratic, but democratic.
2. Classical period—Tribunals of jurors as judges—Juries of 500 persons—Socrates' Trial.
3. Aristotle's description of the drawing of the jury and the conduct of the trial—Mock-trial of Lucian—Juries the all-powerful judges of law and of fact.
4. Civil litigation—Record of the lawsuit of Pausimachos' Heirs v. Calymna City.
5. Places of trial—Phidias' trial in the Market-place—Trial of Orestes on the Areopagus.
6. Jury-trial and forensic oratory—Lysias, the speech-writer—Hyperides and the trial of Phryne—Demosthenes' speech in the case of Darius v. Dionysodorus—Demosthenes' speech on the Crown.
7. Legislation—Minos the first law-giver—City-laws of Gortyna—Solon the legislator—Legislative methods.
8. Conveyancing—Deed, Lease, Loan—Drainage Contract.
9. Greek Art and Literature in contrast to Greek Legal Science.



GREECE & THE ADJOINING LANDS



VI. 1—MAP OF GREECE

## VI

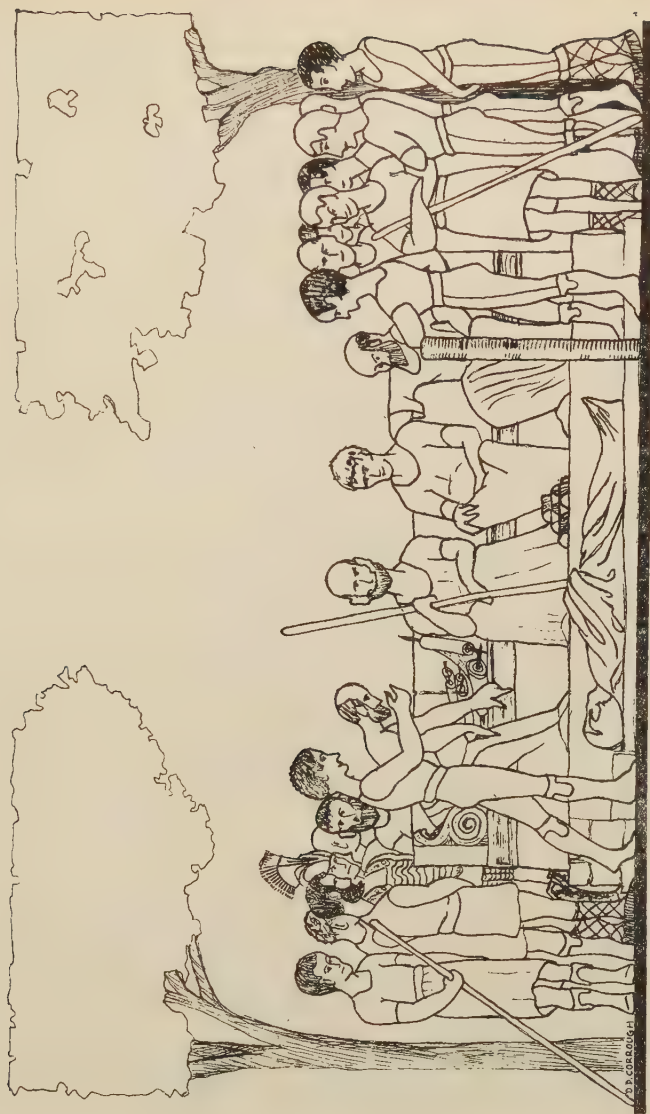
# The Greek Legal System



THE Greek legal system extended in tangible history, from the Homeric or Trojan period, perhaps B. C. 1200, to the absorption of Greece into the Roman system, about A. D. 300.<sup>1</sup> In Homeric Greece, with its numerous independent clans of freemen, we meet for the first time in legal history a new type of Justice and Law,—the democratic type.

There was never (until Alexander's time) a single unified Greek nation, an empire, under an autocratic ruler. The Greek race emerges into history as a hundred or more local tribes, or clans, or city-states, each independent, and each based more or less on democracy. In each tribe, in palaces such as that of Mycenae, the king, or chieftain, presided in patriarchal fashion. Agamemnon, king of Mycenae, and brother-in-law to fair Helen of Troy, was the most powerful chieftain of his time, and to the siege of Troy he took twelve hundred ships and the largest train of followers; he walked among his clansmen, as Homer tells us, like a bull amidst the horned herd, like unto Jove in eye and forehead. But his leadership was primarily that of a battle chieftain. And the civic justice within the tribe was done, not by his autocratic or divinely inspired royal decree, as in Egypt and Babylon and





VI. 1a—THE TRIAL SCENE ON ACHILLES' SHIELD

## *VI. Greek Legal System*

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India, but by the general assembly of the clan or tribe.

The earliest specific mention of this democratic justice is found in Homer's description of one of the scenes depicted on the splendid shield which Hephaestos made for Achilles in the Trojan war<sup>1a</sup>; it reads:<sup>a</sup>

"In the market-place  
The people were assembled for a lawsuit.  
The parties were disputing o'er a sum  
Offered to buy off guilt for taking life.  
The killer vouches that the sum is fair,  
And to the people pleads he should be quit.  
The dead man's kinsman says, 'Tis not enough.  
Both asked for judgment to decide the case.  
Anon loud clamor favored each in turn,  
For each had eager friends among the crowd,  
And heralds held in check the noisy throng.  
The elders of the tribe, on polished stones  
Ranged round the center, sat and gravely heard.  
Then, with a herald's scepter in his hand,  
Each elder rose, and in his turn proposed  
The judgment he advised. And in the midst  
Two golden talents lay, to be the fee  
Of that wise elder who should speak  
The fairest judgment on the pending case."

Here we see the democratic type of justice, precisely as in the primitive Germanic period, one thousand years later; the parties plead their cause before the assembly of freemen; the chief presides as umpire; then the wise elders, skilled in the law, propose various judgments;



## *1. Justice Secular and Democratic*

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then the freemen acclaim the best one and thus decide the case.

Themis, the goddess of justice, plays a prominent part in Greek literature; for the Greeks, though lacking political unity, had a common civilization and mythology. Themis was a consort of Zeus, and her two daughters were Dike, or morality and divine law, and Eunomia, or law and order. The Greek word "themis" and our word "doom", a judgment, are the same in etymology, and "deemster", or "doomsman", in the English Isle of Man is still the term for "judge". The goddess Themis had a temple of her own,<sup>2</sup> located near the famous plain of Marathon; the marble chair on the right was for Themis, on the left for Nemesis; and the statue of Nemesis, seen dimly within the temple, was made by Phidias the great sculptor.

The spirit of Greek justice, however, in classical times, was not theocratic, as in the earlier Oriental systems already described, but was secular; and civic officials, not priests, administered it.

2. The organization of justice, and the jurisdiction of the various courts, at Athens, changed from time to time, with the political fluctuations between democracy and oligarchy; but its spirit, after the reforms of Solon, and especially at the typical periods of Pericles (B. C. 450)



VI. 2—TEMPLE OF THEMIS

This temple was near the plain of Marathon. The marble chair on the right was for Themis, on the left, for Nemesis, and the statue of Nemesis is seen within

## 2. *Trial Method*

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and of Demosthenes (B. C. 350), was essentially democratic.

The trial method then was only an advanced form of the early one, in the tribal assembly, depicted by Homer on the shield. At Athens, each year a jury-list of six thousand or more names was made up. For ordinary cases, a panel of two hundred and one names (at another period, five hundred and one names), drawn by lot, might suffice; but for special cases the panel might be as many as one thousand or fifteen hundred or even twenty-five hundred jurymen. In Socrates' trial (about B. C. 400) five hundred and one jurors voted; and he was found guilty by a majority of only sixty.<sup>b</sup>

Under the system instituted by Solon, as it ultimately developed, an Athenian trial was entirely in the hands of non-professionals. The presiding magistrate was selected by lot, the jurors were drafted from the whole citizen body, any citizen could be prosecutor, and the defendant conducted his own case.

There were magistrates who supervised the preliminary proceedings; but at the trial, the magistrate was no more than a chairman of a public assembly. There was no presiding judge, to declare the law authoritatively. There was no appeal, in the modern sense. The citizens were the whole court,—judges of law and of fact, without

## *VI. Greek Legal System*

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control. There was no jury-deliberation. After the evidence and speeches, all filed out, casting their ballots in the verdict-urn as they departed.

The trial of Socrates, above referred to, was (what we should call) a criminal prosecution. In such prosecutions, the penalty was for some classes of cases fixed beforehand by law (or by agreement), and for others was left to the jury to determine; Socrates' offences—impiety and the corruption of youth—were of the latter sort. In such cases, the first verdict pronounced upon guilt only; and if the verdict was guilty, a second hearing and vote took place to determine the penalty. It was between these votes that Socrates (in Plato's report) delivered his celebrated speech on the penalty due him. In its noble nonchalance, it is unequalled. Socrates calmly declared, to the jurors who had condemned him, that he did not fear their highest penalty—death; for, he said, "the difficulty, my friends, is not in avoiding death, but in avoiding unrighteousness; for that pursues us faster than death".— Socrates was the expounder (though not the inventor) of the great art of cross-examination as a mode of extracting truth; an art which the philosophers, in modern times, have misguidedly abandoned to the lawyers. And even during those thirty days of imprisonment that elapsed before the fatal cup of hemlock was handed to him,<sup>3</sup> and while he sat in chains, conversing with his

## 2. *Trial Method*

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VI. 3—SOCRATES IN PRISON, DRINKING THE FATAL HEMLOCK

disciples in those masterpieces of dialogue transmitted to us by Plato, we find him still shrewdly and genially wielding that wonderful weapon of cross-examination, in discussing the immortality of the human soul.

3. Athenian law and justice had come to turn essentially on the jury-system, and it was elaborately organized, in the city's constitution. So dominant is this feature, for making any estimate of Greek law and justice, that Aristotle's detailed account of the procedure must here be quoted. This text of Aristotle's monograph on the "Government of Athens", lost for more than two



## VI. Greek Legal System

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thousand years, came to light some forty years ago, in a papyrus discovered in Egypt (under strange circumstances never yet fully revealed in print); and that portion of the fragments describing the jury-system was completely reconstructed only in 1903, and published in translation only in 1920.<sup>4</sup> It reads as follows:<sup>c</sup>

[*Aristotle's Account of the Jury-System.*] "Ch. 63. [*Drawing the Juries by Lot.*] The juries for the law-courts are chosen by lot by the nine Archons, each for their own tribe, and by the clerk to the Thesmothetae for the tenth. There are ten entrances into the courts, one for each tribe; twenty rooms in which the lots are drawn, two for each tribe; a hundred chests, ten for each tribe; other chests, in which are placed the tickets of the jurors on whom the lot falls; and two vases. Further, staves, equal in number to the jurors required, are placed by the side of each entrance; and counters are put into one vase, equal in number to the staves. These are inscribed with letters of the alphabet beginning with the eleventh (lambda), equal in number to the courts which require to be filled. All persons above thirty years of age are qualified to serve as jurors, provided they are not debtors to the state and have not lost their civil rights. If any unqualified person serves as juror, an information is laid against him, and he is brought before the court; and, if he is convicted, the jurors assess the punishment or fine which they consider him to deserve. If he is condemned to a money fine, he must be imprisoned until he has paid up both the original debt, on account of which the information was laid against him, and also the fine which the court has imposed upon him. Each juror has his ticket of boxwood, on which is inscribed his name, with the name of his father and his city-ward, and one of the letters of the alphabet up to kappa;\* for the jurors in their several tribes are divided into

\*[The tenth letter of the alphabet. Thus the whole body of jurors was divided into ten sections, indicated by the letters from alpha to kappa; and the courts for which jurors were required were indicated by the requisite number of letters from lambda onwards.]



VI. 4—ARISTOTLE'S TREATISE ON THE GOVERNMENT OF ATHENS

## VI. Greek Legal System

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ten sections, with approximately an equal number in each letter. When the Thesmothetes has decided by lot which letters are required to attend at the courts, the servant puts up above each court the letter which has been assigned to it by the lot.

"Ch. 64, 65. [*Assigning the Juries to the Different Courts.*] The ten chests above mentioned are placed in front of the entrance used by each tribe, and are inscribed with the letters of the alphabet from alpha to kappa. The jurors cast in their tickets, each into the chest on which is inscribed the letter which is on his ticket; then the servant shakes them all up, and the Archon draws one ticket from each chest. The individual so selected is called the Ticket-hanger, and his function is to hang up the tickets out of his chest on the bar which bears the same letter as that on the chest. He is chosen by lot, lest, if the Ticket-hanger were always the same person, he might tamper with the results. There are five of these bars in each of the rooms assigned for the lot-drawing. Then the Archon casts in the dice and thereby chooses the jurors from each tribe, room by room. The dice are made of brass, coloured black or white; and according to the number of jurors required, so many white dice are put in, one for each five tickets, while the remainder are black, in the same proportion.\* As the Archon draws out the dice, the crier calls out the names of the individuals chosen. The Ticket-hanger is included among those selected. Each juror, as he is chosen and answers to his name, draws a counter from the vase, and holding it out with the letter uppermost shows it first to the presiding Archon; and he, when he has seen it, throws the ticket of the juror into the chest on which is inscribed the letter which is on the counter, so that the juror must go into the court assigned to him by lot, and not into one chosen by himself, and that it may be impossible for any one to collect the jurors of his choice into any particular court. For this purpose

\*[Thus the process of selection is as follows: The Ticket-hanger arranges all the tickets on a bar, which establishes their order. Then the Archon draws a die; if it is white, the owners of the first five tickets on the bar serve on the jury, while if it is black they are rejected; and so on through the whole number. The selected jurors are then assigned to the several courts in accordance with the lots drawn from the vases.]

### 3. Jury Procedure

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chests are placed near the Archon, as many in number as there are courts to be filled that day, bearing the letters of the courts on which the lot has fallen.

"The juror thereupon, after showing his counter again to the attendant, passes through the barrier into the court. The attendant gives him a staff of the same colour as the court bearing the letter which is on his counter, so as to ensure his going into the court assigned to him by lot; since, if he were to go into any other, he would be betrayed by the colour of his staff. Each court has a certain colour painted on the lintel of the entrance. Accordingly the juror, bearing his staff, enters the court which has the same colour as his staff, and the same letter as his counter. As he enters, he receives a voucher from the official to whom this duty has been assigned by lot. So with their counters and their staves the selected jurors take their seats in the court, having thus completed the process of admission. The unsuccessful candidates receive back their tickets from the Ticket-hangers. The public servants carry the chests from each tribe, one to each court, containing the names of the members of the tribe who are in that court, and hand them over to the officials assigned to the duty of giving back their tickets to the jurors in each court, so that these officials may call them up by name and pay them their fee.

"Ch. 66. [*Organizing the Court.*] When all the courts are full, two ballot boxes are placed in the first court, and a number of brazen dice, bearing the colours of the several courts, and other dice inscribed with the names of the presiding officials. Then two of the Thesmothetae, selected by lot, severally throw the dice with the colours into one box, and those with the officials' names into the other. The official whose name is first drawn is thereupon proclaimed by the crier as assigned for duty in the court which is first drawn, and the second in the second, and similarly with the rest. The object of this procedure is that no one may know which court he will have, but that each may take the court assigned to him by lot.



## VI. Greek Legal System

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"When the jurors have come in, and have been assigned to their respective courts, the presiding official in each court draws one ticket out of each chest (making ten in all, one out of each tribe), and throws them into another empty chest. He then draws out five of them, and assigns one to the superintendence of the water-clock, and the other four to the telling of the votes. This is to prevent any tampering beforehand with either the superintendent of the clock or the tellers of the votes, and to secure that there is no malpractice in these respects. The five who have not been selected for these duties receive from them a statement of the order in which the jurors shall receive their fees, and of the places where the several tribes shall respectively gather in the court for this purpose when their duties are completed; the object being that the jurors may be broken up into small groups for the reception of their pay, and not all crowd together and impede one another.

"Ch. 67. [*Conduct of the Trial.*] These preliminaries being concluded, the cases are called. If it is a day for private cases, the private litigants are called. Four cases are taken in each of the categories of actions defined in the law, and the litigants swear to confine their speeches to the point at issue. If it is a day for public causes, the public litigants are called, and only one case is tried. Water-clocks are provided, having small supply-tubes, into which the water is poured by which the length of the pleadings is regulated. Ten gallons are allowed for a case in which an amount of more than five thousand drachmas is involved, and three for the second speech on each side. When the amount is between one and five thousand drachmas, seven gallons are allowed for the first speech and two for the second; when it is less than one thousand, five and two. Six gallons are allowed for arbitrations between rival claimants, in which there is no second speech. The official chosen by lot to superintend the water-clock places his hand on the supply-tube whenever the clerk is about to read a resolution or law or affidavit or contract. When, however, a case is conducted according to a set measurement



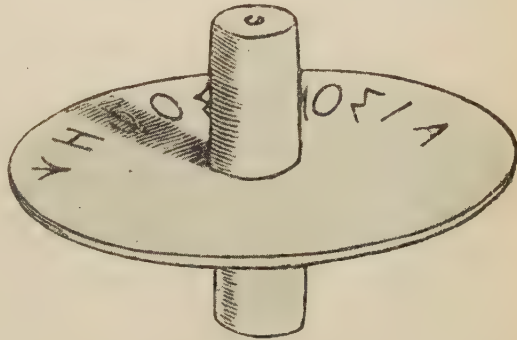
### 3. Jury Procedure

of the day, he does not stop the supply, but each party receives an equal allowance of water.\* The standard of measurement is the length of the days in the month Poseideon . . . . . The measured day is employed in cases when imprisonment, death, exile, loss of civil rights, or confiscation of goods is assigned as the penalty.

"Most of the courts consist of 500 members . . . . ; and when it is necessary to bring public cases before a jury of 1,000 members, two courts combine for the purpose, while the most important cases of all are brought before 1,500 jurors, or three courts. The ballot balls are made of brass with stems running through the centre, half of them having the stem pierced and the other half solid. When the

speeches are concluded, the officials assigned to the taking of the votes give each juror two ballot balls, one pierced and one solid.<sup>5</sup> This is done in full view of the rival litigants, to secure that no one shall receive two pierced or two solid balls. Then the official designated for the purpose takes away the jurors'

staves, in return for which each one as he records his vote receives a brass voucher marked with the numeral 3 (because he gets three



VI. 5—JURYMAN'S BALLOT

Each juror received two ballots, marked so as to indicate plaintiff and defendant. One ballot he cast into the voting urn, the other into a discard-urn

\*[In ordinary suits, fixed allowances of water (i. e. of time as measured by the water-clock) were given for each speech, and the time occupied in the reading of affidavits, etc., was not included in the allowances, so that the water-clock was stopped while they were read. In more important cases a certain portion of the day was allotted to either side, without allowance for the time occupied by reading documents.]

## VI. Greek Legal System

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obols when he gives it up). This is to ensure that all shall vote; since no one can get a voucher unless he votes. Two urns, one of brass and the other of wood, stand in the court, in distinct spots so that no one may surreptitiously insert ballot balls; in these the jurors record their votes. The brazen urn is for effective votes,\* the wooden for unused votes; and the brazen urn has a lid pierced so as to take only one ballot ball, in order that no one may put in two at a time.

"When the jurors are about to vote, the crier demands first whether the litigants enter a protest against any of the evidence; for no protest can be received after the voting has begun. Then he proclaims again, 'The pierced ballot for the plaintiff, the solid for the defendant'; and the juror, taking his two ballot balls from the stand, with his hand closed over the stem so as not to show either the pierced or the solid ballot to the litigants, casts the one which is to count into the brazen urn, and the other into the wooden urn.

"Ch. 69. [*Announcing the Judgment.*] When the jurors have voted, the attendants take the urn containing the effective votes and discharge them on to a reckoning board having as many cavities as there are ballot balls, so that the effective votes, whether pierced or solid, may be plainly displayed and easily counted. Then the officials assigned to the taking of the votes tell them off on the board, the solid in one place and the pierced in another, and the crier announces the numbers of the votes, the pierced ballots being for the prosecutor and the solid for the defendant. Whichever has the majority is victorious; but if the votes are equal the verdict is for the defendant. Then, if damages have to be awarded, they vote again in the same way, first returning their pay-vouchers and receiving back their staves. Half a gallon of water is allowed to each party for the discussion of the damages. Finally, when all has been completed in accordance with the law, the jurors receive their pay in the order assigned by the lot."

\*[i. e. those which record the juror's actual vote. Each juror receives two ballots, and uses one (pierced or solid according as he votes for the plaintiff or the defendant) to record his vote, and throws the other away.]

### *3. Jury Procedure*

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Jury-trial, as thus organized, was much more than our modern expedient for determining private claims and ordinary criminal charges. It was also, in effect, a chief engine for controlling the government. In a variety of ways, unknown to modern States, almost any issue of politics or administration or civic duty could under the Athenian constitution be submitted to a jury-trial; and any citizen could in virtually any case institute such a proceeding. Except during holiday periods or military operations, these jury-courts with their thousands of jurors were in almost constant session. Under Pericles, the practice of compensating jurors with a fee was introduced, and in the ensuing century a willing citizen might almost rely upon jury service for a regular income. The reproach of litigiousness, often levelled at the Athenians, may have been unjust, in view of all the circumstances. But trial by mass-jury was certainly a most prominent feature of their civic life. In Aristophanes' comedy of the "Clouds", a visitor in the clouds, when pointed out the city of Athens on the map, replies, "I don't believe it, for I see no juries sitting".

No contemporary eye-witness account of an Athenian jury-trial is extant. The trial-scene in Aristophanes is too obviously exaggerated to be typical. But a fair impression of the ordinary trial-day may be gained from

## VI. Greek Legal System

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Lucian's clever skit entitled "The Double Indictment". The famous cosmopolite and wit, Lucian, beginning as an advocate, had first reached eminence in the ranks of Oratory; but then, changing his style, had cultivated the Dialogue. This style, hitherto reserved for the philosophers, he had used in a semi-dramatic form, as a vehicle of satire. Being reproached, first, by the orators, for deserting them, and then by the philosophers, for maltreating their literary prerogative, he revenged himself on both camps with this drama-dialogue, in which he represents himself as sued by both Oratory and Dialogue. The scene is a trial-day at Athens; Zeus, overwhelmed with the world's business, but stung by the complaints of the Athenians about the delays in litigation, has decided to allot a day to clearing up the court-calendar. So he orders his daughter Dike (Justice), with Hermes (as clerk) to go down to Athens for the purpose:<sup>cc</sup>

[*A Trial-Day in Athens.*] "*Zeus (to Hermes).* Fly down and proclaim that there will be a session of court under the following regulations: All who have entered suit are to come to the Areopagus today; at that place Justice is to empanel juries for them out of the entire body of Athenians, the number of jurymen to depend upon the penalty involved; and if anyone thinks that his hearing has been unjust, he is to be allowed to appeal to me and have the case tried afresh, just as if it had not been tried at all. (To Justice) Daughter, take your place beside the Dread Goddesses [the Eumenides], empanel the juries and supervise the trials . . . . .

### 3. Jury Procedure

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"*Hermes*. Oyez, oyez! Under the blessing of Heaven, we shall hold a session of court today, the seventh of the month Elaphebolion. All who have entered suits are to come to the Areopagus, where Justice will empanel the juries and be present in person at the trials. The jurors will be drawn from the entire body of Athenians; the pay will be three obols a case, and the number of jurors will be in accordance with the charge. All those who have entered suits but have died before they came to trial are to be sent back to earth by Aeacus. If anyone thinks he has had an unjust hearing, he is to appeal the case, and the appeal will be to Zeus.

"*The God Pan*. Heavens, what a hubbub! What a shout they raise, Justice, and how eagerly they are gathering at a run, dragging each other up the hill, straight for the Areopagus! Hermes, too, is here already; so busy yourselves with the cases, empanel your juries and give your verdicts as usual . . . . .

"*Hermes*. Come, Justice, let's call them to the bar.

"*Justice*. Quite right. Indeed they are approaching in crowds, as you see, with a great noise, buzzing about the hilltop like wasps.

"*Athenian*. I've got you, curse you!

"*Second Athenian*. You are a blackmailer!

"*Third Athenian*. At last you are going to pay the penalty!

"*Fourth Athenian*. I will prove that you have committed horrible crimes!

"*Fifth Athenian*. Empanel my jury first!

"*Sixth Athenian*. Come to court with me, scoundrel!

"*Seventh Athenian*. Stop choking me!

"*Justice*. Do you know what we ought to do, Hermes? Let us put off the rest of the cases until tomorrow, and today let us provide only for those entered by professions or pursuits or sciences against men. Pass me up the writs of that description.

"*Hermes*. Intemperance *v.* the Academy, in re Polemo: kidnapping.



## VI. Greek Legal System

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"Justice. Draw seven jurors.

"Hermes. *Stoa v. Pleasure*: alienation of affections—because Pleasure coaxed away her lover, Dionysius.

"Justice. Five will do.

"Hermes. *High-living v. Virtue*, in re Aristippus.

"Justice. Let five sit in this case too.

"Hermes. *Banking v. Diogenes*: absconding.

"Justice. Draw only three.

"Hermes. *Painting v. Pyrrho*: breach of contract.

"Justice. Let nine sit on jury.

"Hermes. Do you want us to provide juries for these two cases also, recorded yesterday against the public speaker?

"Justice. Let us finish up the cases of long-standing; these can go over until tomorrow for trial.

"Hermes. Why, these are of the same nature, and the complaint, although recent, is very like those for which we have already provided juries, so that it ought to be tried along with them.

"Justice. You appear to have been unduly influenced to make the request, Hermes. Let us make the drawing, however, since you wish; but only for these two cases; we have enough on the docket. Give me the writs.

"Hermes. *Oratory v. the Syrian*: neglect. *Dialogue v. the same*: maltreatment.

"Justice. Who is this man, the Syrian? His name is not recorded.

"Hermes. Empanel a jury for him as it stands in the writ—for the public speaker, the Syrian [i. e. Lucian]. There is nothing to hinder its being done anonymously.

"Justice. Look here, are we really to try cases from over the border here in Athens, on the Areopagus? They ought to have been tried on the other side of the Euphrates. However, draw eleven jurors, the same men to sit for both cases.

### 3. *Jury Procedure*

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"*Hermes*. You are right, Justice, to avoid spending too much in jury-fees.

"*Justice*. Let the first jury sit, in the case of Intemperance *v.* the Academy. Fill the water-clock. Plead first, Intemperance . . . . Why does she hold her tongue and shake her head? Go to her and find out, *Hermes*.

"*Hermes*. She says that she cannot plead her case because her tongue is tied with drink and she is afraid of getting laughed at in court. She can hardly stand, as you see.

"*Justice*. Then let her have an advocate appear, one of these public pleaders. There are plenty of them ready to split their lungs for three obols!

"*Hermes*. But not one will care to espouse the cause of Intemperance, not openly, at any rate. However, this request of hers seems reasonable.

"*Justice*. What request?

"*Hermes*. 'The Academy', she says, 'is always ready to argue on both sides and trains herself to be able to speak eloquently both pro and con. Therefore let her plead first for me, and then after that she will plead for herself.'

"*Justice*. That is unprecedented. Nevertheless, make both speeches, Academy, since it is easy for you.

"*Academy*. Listen first, gentlemen of the jury, to the plea of Intemperance, as the water now runs for her.

"The poor creature has been treated with the greatest injustice by me, the Academy. She has been robbed of the only friendly and faithful slave she had, who thought none of her orders unbecoming, Polemo yonder, who used to go roistering through the middle of the square in broad day . . . . I have said about all that there is to say for Intemperance. Now I will speak for myself, and from this point let the water run for me.

## VI. Greek Legal System

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"*Justice*. What in the world will she say in reply to that? Anyhow, pour in the same amount for her in turn.

"*Academy*. Heard casually, gentlemen of the jury, the plea which the advocate has made in behalf of Intemperance is quite plausible, but if you give an unprejudiced hearing to my plea also, you will find out that I have done her no wrong at all.

"This man Polemo, who, she says, is her servant, was not naturally bad or inclined to Intemperance, . . . . . At length he abandoned her then and there, and took up with me, not because I either invited or constrained him, as this person says, but voluntarily, because he believed the conditions here were better. Please summon him now, that you may see how he has fared at my hands. . . . . He himself is grateful to me for it, as are also his relatives on his account.

"I have done. It is for you not to consider which of us it was better for him to associate with.

"*Justice*. Come, now, do not delay; cast your ballots and get up; others must have their hearing.

"*Hermes*. The Academy wins by all the votes but one.

"*Justice*. It is not at all surprising that there should be one man to vote for Intemperance. Take your seats, you who have drawn to hear *Stoa v. Pleasure* in re a lover. The clock is filled. You with the paint upon and the gaudy colors, make your plea now.

"*Stoa*. I am not unaware, gentlemen of the jury, that I shall have to speak against an attractive opponent; . . . . .

"This is all I have to say, for I am not at all fond of long speeches. But if she should consent to let me put questions and to give a brief reply to each, it would very soon be evident that she amounts to nothing. However, remember your oath and vote in accordance with it now, putting no faith in Epicurus, who says that the gods take no note of what happens among us.

### 3. Jury Procedure

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"*Justice*. Stand aside. Epicurus, speak for Pleasure.

"*Epicurus*. I shall not address you at length, gentlemen of the jury, for I myself do not need many words.

"If Pleasure had used charms or philtres to constrain Dionysius, whom Stoa claims to be her lover, to desert Stoa, and to centre his regard upon her, she might fairly have been held a sorceress and might have been found guilty of using undue influence upon the lovers of others. . . .

"I have done. Cast your ballots with this understanding of the case.

"*Stoa*. No, no! Let me cross-question him a little.

"*Epicurus*. Put your questions; I will answer them.

"*Stoa*. Do you consider pain bad?

"*Epicurus*. Yes.

"*Stoa*. And pleasure good?

"*Epicurus*. Certainly.

"*Stoa*. Well, do you know the meaning of 'material' and 'immaterial', of 'approved' and 'disapproved'?

"*Epicurus*. Certainly.

"*Hermes*. Stoa, the jurors say they can't understand these dissyllabic questions, so be silent; they are voting.

"*Stoa*. I should have won if I had put him a question in the form of the 'third indemonstrable'.

"*Justice*. Who won?

"*Hermes*. Pleasure, unanimously.

"*Stoa*. I appeal to Zeus!

"*Justice*. Good luck to you! Hermes, call another case.

"*Hermes*. Virtue *v.* High-living, in re Aristippus. Let Aristippus appear in person.

## VI. Greek Legal System

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"*Virtue*. I ought to speak first; I am Virtue, and Aristippus belongs to me, as his words and his deeds indicate.

"*High-living*. No, indeed; I ought to speak first; I am High-living, and the man is mine, as you can see from his garlands, his purple cloak and his perfumes.

"*Justice*. Do not wrangle; this case will stand over until Zeus decides the case of Dionysius, for this seems to be similar. Consequently, if Pleasure wins, High-living shall have Aristippus, but if Stoa prevails, he shall be adjudged to Virtue. So let others appear. Look here, though—these jurors are not to get the fee, for their case has not come to trial.

"*Hermes*. Then are they to have come up here for nothing, old as they are, and the hill so high?

"*Justice*. It will be enough if they get a third. Go your ways; don't be angry, you shall serve another day.

". . . . . Now call the speech-writer, the Syrian. After all, it was only recently that the writs were lodged against him, and there was no pressing need to have tried the cases now. However, since that point has been decided, take the suit of Oratory first. Heavens, what a crowd has come together for the hearing!

"*Hermes*. Naturally, Justice. The case is not stale, but new and unfamiliar, having been entered only yesterday, as you said, and they hope to hear Oratory and Dialogue bringing charges in turn and the Syrian defending himself against both; this has brought crowds to court. But do begin your speech, Oratory.

"*Oratory*. In the first place, men of Athens, I pray the gods and goddesses one and all that as much good will as I steadily entertain toward the city and toward all of you may be shown me by you in this case . . . . . But not to prolong my introduction when the water has been running freely this long time, I will begin my complaint.



### 3. Jury Procedure

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"When this man was a mere boy, gentlemen of the jury, still speaking with a foreign accent and I might almost say wearing a caftan in the Syrian style, I found him still wandering about in Ionia, not knowing what to do with himself; so I took him in hand and gave him an education. . . . Then, after we were married, I got him irregularly registered among my own clansmen and made him a citizen, so that those who had failed to secure my hand in marriage choked with envy. . . . Is he not, then, ungrateful and subject to punishment under the laws that concern desertion, inasmuch as he so disgracefully abandoned his lawful wife? . . . I have finished, gentlemen of the jury. But I beg you, if he wishes to make his defence in my style of speaking, do not permit that . . .

"*Hermes.* That is unreasonable. It is not possible, Oratory, for him, all by himself, to make his defence after Dialogue's manner. Let him make a speech as you did.

"*The Syrian [Lucian.]* Gentlemen of the jury, as my opponent was indignant at the thought of my using a long speech when I acquired my power of speaking from her, I shall not say much to you, but shall simply answer the main points of her complaint and then leave it to you to weigh the whole question. In all that she told about me she told the truth. She gave me an education and went abroad with me and had me enfranchized as a Greek, and on this account, at least, I am grateful to her for marrying me . . . I could not stand this, and as I did not think it best to bring an action for divorce against her on the ground of adultery, I went to Dialogue, who lived near by, and requested him to take me in.

"This is the great injustice that I have done Oratory . . .

"Though I have much to say, I will stop now. Cast your vote in accordance with your oath.

*(The votes are counted.)*

"*Justice.* Who is the winner?

## VI. Greek Legal System

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"*Hermes*. The Syrian, with every vote but one.

"*Justice*. Very likely it was an orator-speaker who cast the vote against him. Let Dialogue plead before the same jury. (*To the jurors*) Wait, and you shall get double pay for the two cases.

"*Dialogue*. For my part, gentlemen of the jury, I should prefer not to make you a long speech, but to discuss the matter a little at a time, as is my wont. Nevertheless I will make my complaint in the way that is customary in courts of law, although I am completely uninformed and inexperienced in such matters. Please consider this my introduction.

"The wrongs done me and the insults put upon me by this man are these . . . . . Have I not been dreadfully maltreated, when I no longer occupy my proper role but play the comedian and the buffoon and act out extraordinary plots for him? . . . . .

"*Hermes*. What are you going to say to this, Master Syrian?

"*The Syrian* [*Lucian*.] Gentlemen of the jury, the suit that I am contesting now before you is unexpected. In fact, I should have looked for anything else in the world sooner than that Dialogue should say such things about me . . . . .

"I have made the best defence that I can. Please bring the same verdict as before.

(*The votes are counted.*)

"*Hermes*. Well, well! You win with ten votes! The same one who voted against you before will not vote with the rest even now. Without doubt it is a habit, and that man always casts the ballot [for guilty] that has a hole in it. I hope he will keep on envying men of standing. Well, go your ways, and good luck to you. Tomorrow we will try the rest of the cases."

This unique institution of a bench of lay-citizens—a virtual mass-meeting—doing justice as judges both of law and fact, naturally raises a question as to their compe-

### 3. *Jury Procedure*

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tency. How did law and justice fare at their hands? A learned editor of Demosthenes' orations has offered some shrewd comments, in answer:<sup>d</sup>

"With respect to the ability of the Athenian jurors to perform the judicial duty imposed on them, there is a good deal to be said on both sides. That they should perform it in a thoroughly business-like manner, or so as to fulfill what may have been Solon's conception of the trust confided to them, was hardly in the nature of things. They had to administer justice according to the written law, and of course to interpret that law; where there was no written statute, they were bound to decide according to the best of their ability; that is, in the absence of any express legislative provision, they were required to apply the general principles of law and justice to the case before them. They were also sole judges of the facts of every case. They were persons of no legal education or learning; taken at haphazard from the whole body of citizens, and mostly belonging to the lowest and poorest class of them.—On the other hand, the Athenians were naturally the quickest and cleverest people in the world. Their wits were sharpened by the habit of attending the theatres and public assemblies, of taking an active part in important debates, and hearing the most splendid orators. There was so much litigation at Athens, that they were constantly either engaged as jurors, or present as spectators in courts of law. Cases of all varieties were brought before them, involving difficult questions concerning pedigree and succession, marital and filial right, mercantile and mining contracts, besides assaults, trespasses, frauds, and criminal charges of every description. Then they lived an out-of-door life, constantly meeting in the market-place or elsewhere, hearing foreign news, discussing politics, etc. All this was a sort of education, and if not the best, still it fitted the people in some measure for the performance of the duties we are speaking of . . . . .

"But would it have been better for the Athenians, if they had had official and permanent judges to direct and control the jury; to

## *VI. Greek Legal System*

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point out the fallacies, the falsehoods, the quibbles and artifices of the speakers; and to decide the various points of law which arose? Such a thing would not only have been incompatible with the spirit of the constitution, but would not, in my opinion, have promoted the ends of justice. Under the existing system, a sort of rough justice was done by the Athenian jurors, and it was owing to their freedom, and to the free government of the state. Under a different system, they might have had no justice at all . . . . . I would rather try an important case before a thousand independent jurors without a judge, than before a pliant jury with a judge. We owe all our liberties to the circumstance that English juries occasionally displayed a little English obstinacy."

Whatever inferences we may make as to the practical merits of this jury-justice, its distinctive constitutional feature was unique, in that this popular jury was the all-powerful tribunal of law and justice. Aristotle records his opinion that in his day (B. C. 325), "the democracy has made itself master of everything, and administers everything by its votes in the assembly and in the law-courts, in which it holds the supreme power." And a modern critic emphasizes this diagnosis in terms significant to a lawyer:<sup>e</sup>

"The real power of the Athenian demos, as he himself well knew, lay in the courts of law. There was his throne, and there his sceptre. There he found compliment, court, and adulations rained upon him so thick, that his imagination began at last to believe what his flatterers assured him, that he was a god, and not a man. And a god in some sense he was; for to no earthly tribunal lay there an appeal from him; his person was irresponsible, his decrees irreversi-

### 3. *Jury Procedure*

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ble; and if ever there was a despotism complete in itself, 'pure, unsophisticated, dephlegmated, defecated' despotism, it was that of an Athenian court of judicature."

Whatever may have been the advantage for justice and equity in particular cases, because of the flexibility of the Athenian jury's power, still on the whole the result of its freedom was to dilute the community's respect for settled rules, and to prevent inevitably the development of a genuine and enduring system of law. And this effect was due mainly to (1) the lack of a body of professional judges, declaring the law to the triers of fact; (2) the size of the juries, identical more or less with the body of citizen-legislators at large; and (3) the lack of any other independent body, voicing the settled law, to be a check upon the citizens either as jurors or as legislators.

The result upon Athenian law has been well characterized by a modern historian, speaking of the period of Socrates' trial:<sup>f</sup>

"The sole guardian of the laws was now the popular courts . . . . The jury courts at Athens were so empanelled (by the drawing by lot of a large group locally distributed) that the justice emanating from them was the justice that animated at the moment the Athenian people. The unlikeness in deciding like cases which is the essence of injustice must, in these circumstances, have vitiated legal decisions, if a national familiarity with law had not been cultivated and sustained by the democratic judicial system. It also served to steady the action of the courts that, as a result of discussions carried on for two centuries, citizens had come to possess



## *VI. Greek Legal System*

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a valuable common stock of juridical ideas. Except for the uniqueness of their legal education, equity must have broken with strict law altogether . . . . . Neither in legal records nor in the training, learning, and experience of those who held court was there much hope of previous decisions making themselves felt in determining verdicts . . . . . Precedents had no legal standing in Attic courts. They could not be invoked authoritatively to restrain the predatory instincts of the jurors when the Athenian people, as in B. C. 410-405, had become embittered against its citizens of wealth and standing, by injury, suspicion and misery.

"The consequences were, accordingly, deplorable. A set of acrid politicians and sycophants, headed by Epigenes, Demophantus, and Cleigenes, encompassed the exile, disfranchisement, or judicial murder of many persons. Others they blackmailed by threats of indictment. . . . . It was in this Athens that Plato became of age to consider the plan and purpose of his life, and of it he was probably thinking when long afterwards he wrote that there was in it 'but a very small remnant of honest followers of wisdom.' These, he thought, 'might be compared to a man who has fallen among wild beasts: he will not be one of them, but he is too unaided to make head against them; and before he can do any good to society or his friends, he will be overwhelmed and perish miserably'."

4. The procedure of civil litigation in Greece was elaborately developed; although its details have had to be reconstructed, by the labors of scholars, from the copious allusions in the extant orations and inscriptions; for no treatises are extant (nor perhaps ever existed), and the original records of litigation that survive are few.

The most interesting and nearly complete one is the record of a lawsuit about B. C. 100, in the island of Cos.

#### 4. *Civil Litigation*

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This was an action for money brought by the heirs of a banker named Pausimachos. It seems that Pausimachos and Hippocrates, two bankers of Cos, had loaned a large sum of money to the city of Calymna; the loan having actually been underwritten by other citizens of Cos. Hippocrates, one of the lenders, had died; his share of the loan had been one-fifth; and Pausimachos, whose share of the loan was four-fifths, had also died. But, in the meantime, certain payments had been made by the city-debtor to the heirs of Hippocrates. The heirs of Pausimachos now claimed from the city of Calymna the payment of their share, on the ground that the former payments should not be credited, because the loan was not a joint loan, but a several one, and the payments to the heirs of Hippocrates could not be credited against the share of the heirs of Pausimachos. The dispute having been referred, by arbitration, to the disinterested city of Cnidos, the trial was to take place before the popular jury of Cnidos, which in this case numbered two hundred and four jurymen. The following is the record of the trial, setting forth the procedure as determined by the councillors and assembly of Cnidos, and then the judgment:<sup>g</sup>

[*Civil Action at Cnidos.*] “[1] [*Rules of Procedure.*] The councillors of Cnidos will administer the oath to the jurors as follows: ‘I swear by Jupiter, by the Lucian Apollo, and by the Earth, that I will decide in the case now at issue between the parties, according

## *VI. Greek Legal System*

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to what shall seem to me most just. I will not decide merely on the word of any one witness, if that witness does not appear to me to speak the truth. I have not received any gift in connection with this suit, neither I nor any one for me, man or woman, directly or indirectly. May I prosper if I keep my oath, but may disaster strike me if I perjure myself!"

"[2] The city ordinances, the summonses, and all other documents that it may be necessary to withdraw from public custody shall be presented to the court by the respective parties but sealed with the seal of the respective cities, in such form as the respective cities shall determine by law. They shall be delivered by the parties to the councillors of Cnidos, and the latter, after breaking the seals, shall take out the documents and deliver them to each of the parties upon the opening of court. Each of the parties shall produce the depositions before the trial opens.

"[3] The time for delivery of speeches shall be limited to eighteen clock-measures for each of the parties for the first speech and to ten clock-measures for the second. Each of the parties may bring not more than four attorneys. The attorneys may also be witnesses.

"[4] The city ordinances, the summonses, the written formula for the suit, and all other documents taken from public custody shall be read by the clerk furnished by the respective parties, and also the depositions, and during this reading the clock shall be stopped.

"[5] As to witnesses, those who are able to be present in person shall give testimony personally before the court; those who are not able to be present in person shall give their testimony to an officer appointed in the respective cities on the 24th day of the month known as Batromios at Calymna and as Caphisios at Cos, in the presence of the opponents, if the latter wish to be present. Witnesses before testifying shall take the oath prescribed by law, viz. that they will tell the truth and that they are unable to attend the

#### 4. *Civil Litigation*

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trial. The depositions thus taken before such officers shall be sealed by the latter under public seal, and countersealed by the respective parties, if they desire. Copies of these depositions shall be promptly delivered to the parties by the officers. Copies of all depositions received at Cos shall be sent by the officers, some of them sealed under public seal, and others not sealed, to the officials of Calymna within twenty days after taking the deposition, and similarly the officers of Calymna shall send copies of all depositions taken before them at Calymna, some sealed under public seal and others not sealed, to the officers of Cos, within twenty days after taking the deposition; and besides, the said officers for such depositions shall do all that ought to be done by the officers of Cos. Citizens of Calymna who go to Cos to be present at these inquiries shall receive from the city of Cos a safe-conduct. The councillors of Cos shall accord to the respective parties at the trial the right to put questions to the witnesses separately, after the opening speeches. The parties may interrogate the witnesses on matters relevant to this lawsuit, but not on other matters.

“[6] If the parties do not finish respectively their speeches within the time limited as above, they are not to speak beyond the moment when the water is entirely emptied from the clock. Upon the completion of the speeches, the councillors shall distribute immediately the voting ballots.

“[7] [*The Claim.*] . . . . Aristodamos, son of Aglaostratos . . . . children of Diagoras [son of Pausimachos] against . . . . in the presence of the councillors of Cnidos . . . . claims as follows: making first a deduction on the loan of Pausimachos and Hippocrates for the money paid in the mayoralty of Alkimachos, and also of the talent which the Calymnians claim was paid to them by Pausimachos and Cleomedes; making deduction also for the precious vessels and the forests [given as security for the loan, and realized on by sale] and of the fifth part of the payments which the Calymnians claim to have made to Pausimachos and to Cleomedes

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[son of Hippocrates], pursuant to the agreement which they claim to have entered into with Pausimachos and Cleomedes, the whole of which, however, is disputed by the heirs of Cleomedes (and from all these payments must be omitted the part applicable to the loan of Hippocrates); and deducting finally the larger sum which the Calymnians claim to have paid to Cleomedes, and also all other payments mentioned in the communication sent by the city of Cos to the city of Calymna, and received by the agents who had gone to Cos, viz. [giving five names], in which we have written down these payments, crediting them to the assets of the heirs of Hippocrates in the accounting for sums due to Hippocrates by the Calymnians, from and after the month Caphisios of the year when Hermonax was in office:

"We claim the balance of this account, reckoned with interest for the share belonging to us. But the Calymnians refuse to pay it, claiming that they have already paid it with interest to Cleomedes, son of Hippocrates, and to Cleophantos, son of Cleomedes.

"Total sum claimed by us: thirty talents [about \$36,000].

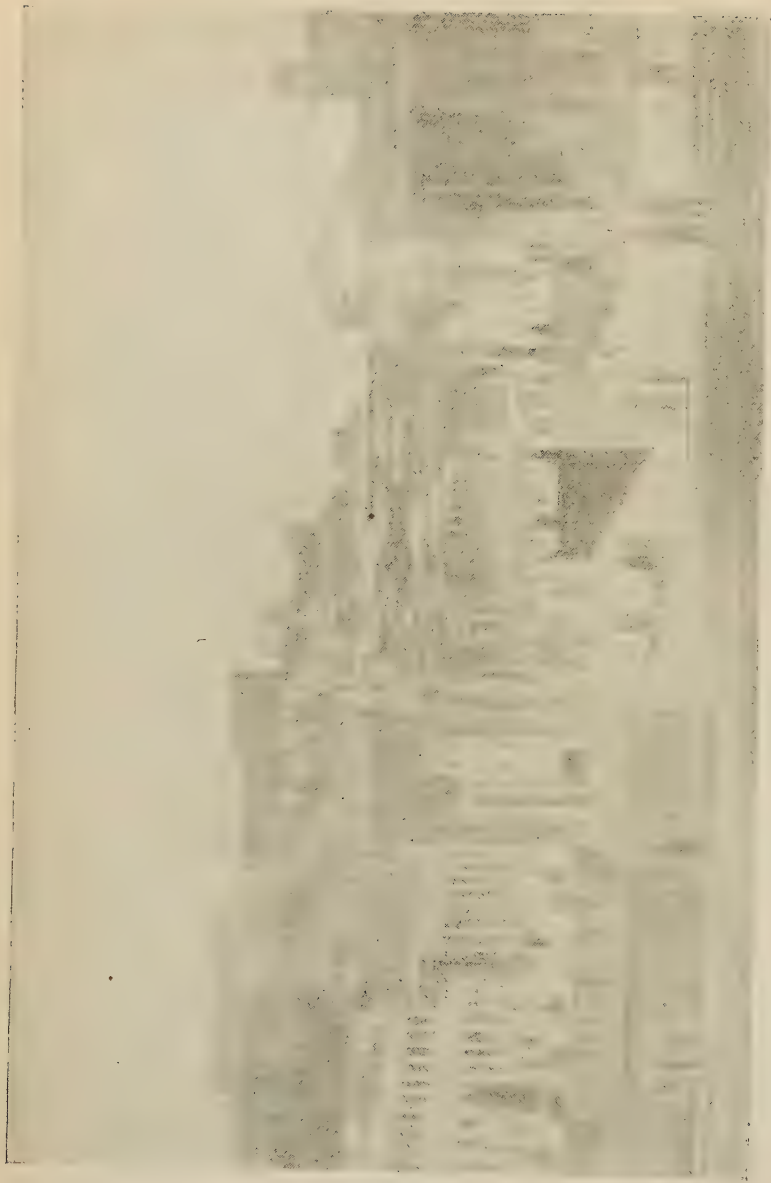
"[8] [*Judgment.*] A vote of judgment being taken, it appeared from the ballots that there were 78 in favor of the claim and 126 against it. Done the 17th day of the month of Elaphrios in the Mayoralty of Alkimachos.

"Attorneys, for the children of Diagoras, Philinos, son of Diocles of Cos; and for the city of Calymna, Hecatonymos, son of Prytanias of Myletus, Exakestos, son of Alkinoos of Calymna, Aratophantos, son of Aristolas of Calymna."

5. The places at which trials were held varied for different classes of cases and at different periods. At Athens, the Agora,<sup>6</sup> or market-place, the Areopagus Hill, and the Pnyx Hill were the chief places of interest for law and politics.







VI. 6—THE MARKET-PLACE AT ATHENS

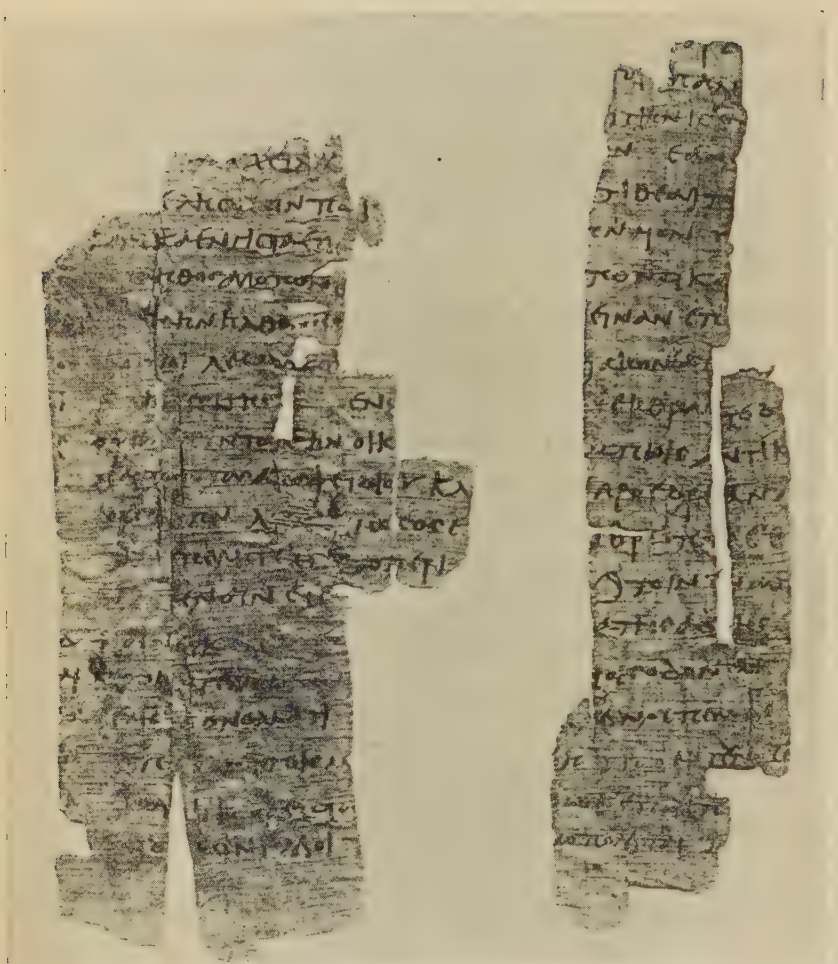
In this Agora the Assembly often was held, and the smaller trial-courts met in various porticos surrounding it

## 5. *Places of Trial*

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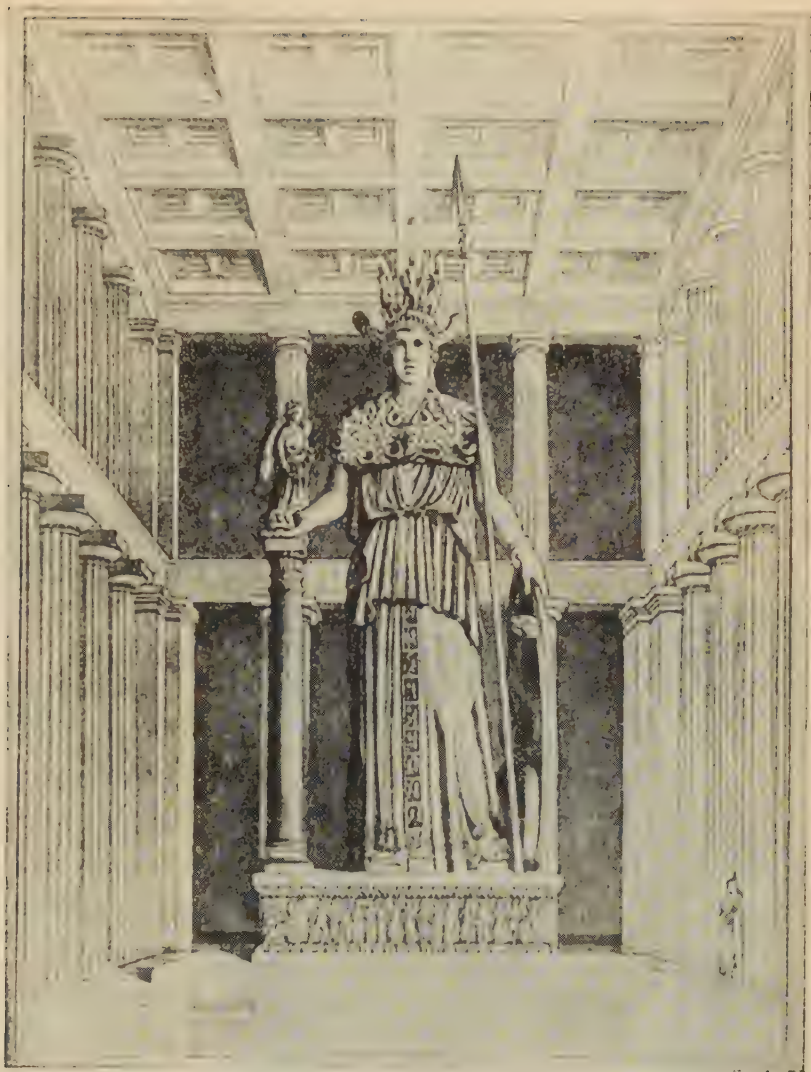
Even at Athens, the most highly developed of the city-states, in its classic period, justice though secular had not reached that advanced stage of modern nations in which justice is sharply separated from general politics. Below, in the market-place, were held occasionally the meetings of the popular Assembly, or Ecclesia, and the Assembly not only enacted laws but sometimes tried political offences. This papyrus,<sup>7</sup> for example, discovered only thirty years ago, is a fragmentary passage from the historian Apollodorus, describing a trial in the market-place. It was the celebrated prosecution of Phidias for embezzling some of the ivory that had been entrusted to him for making the world-famous statue of Athena. The statue was composed all of gold and ivory.<sup>8</sup> Phidias had received the order to make this for the Parthenon Temple. Pericles, the great statesman who beautified Athens architecturally, had given Phidias a free hand in the purchase of materials. But a jealous workman laid an information for embezzlement. Pericles' political enemies pushed the prosecution zealously; and though the scandalous charge proved groundless, it ended the great sculptor's career at Athens.

But usually the Assembly met on the hill called Pnyx; it was there that Pericles, and other famous statesmen, moved the assemblies with their eloquence; and it was



# VI. 7—THE TRIAL OF PHIDIAS

This fragment of a papyrus contains an account of the trial of Phidias for embezzling the ivory furnished him for the statue of Athena



VI. 8—STATUE OF ATHENA

This statue, in the Parthenon, was made by Phidias the sculptor,  
and his trial was for embezzling some of the ivory



## VI. Greek Legal System

there in the open air, under the warm blue Greek sky, before the massed multitudes, every citizen being a legislator, that the great art of political oratory was first developed in the world's history.<sup>9</sup>

Another hill, the Areopagus, was sacred to the legend of Orestes, and in the earlier period this was the special place for certain trials for homicide. In the legend, Orestes had deliberately killed his adulterous mother, and was brought to trial; the Furies or Avengers were the prosecutors: the goddess Athena presided; she had frankly

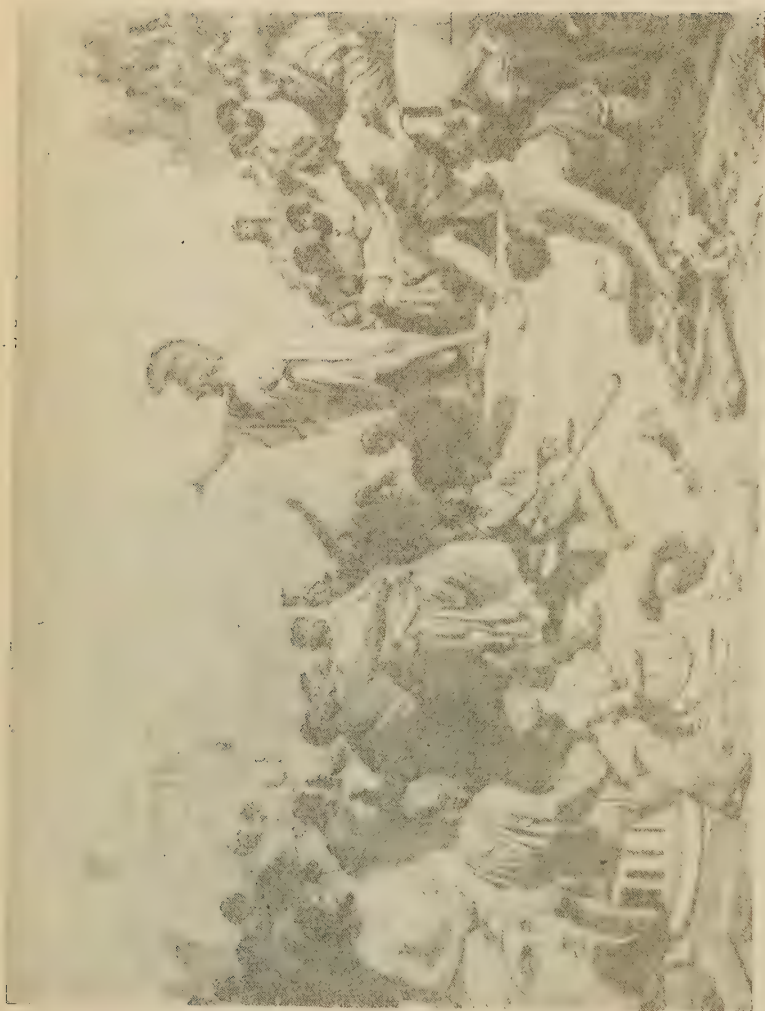
declared herself ready to cast the deciding vote in his favor. However, the jurors acquitted him;<sup>10</sup> and Orestes, in gratitude, then erected a memorial altar to



VI. 10—THE TRIAL OF ORESTES

The jurymen are seen on the right, casting their ballots





VI. 9—PERICLES ADDRESSING THE ASSEMBLY ON THE PNYX

## 5. *Places of Trial*

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justice; and here met the once supreme tribunal of the Areopagus, or Senate of One Hundred, as ordained in the goddess Athena's words: "This court, majestic, incorruptible, the sleepless guardian of my land I set."

It was on the Areopagus that Paul the Apostle made his memorable address to the people of Athens, "O men of Athens, God hath made of one blood all nations that dwell upon the earth". And it was before the Court of the Areopagus that the celebrated lawsuit is said to have been brought, related in the anecdote of the contingent fee of Protagoras, the teacher of oratory. He made a contract with his pupil Evalthus that his fee should be payable when the young man won his first lawsuit. After a while the lessons ceased and the teacher pronounced him competent, but the young man insisted that he was not. So the teacher sued. While waiting for trial, the teacher said to his friends: "I win, either way; for if the judgment is for me, he must pay; but if it is for him, he has won his first suit and under the contract he must therefore pay." But the young man said to his friends, "I win, either way; for if the judgment is for me, I am not liable; and if the judgment is against me, I have not yet won my first suit." The judges, it is said, were so puzzled by this logical dilemma, that they adjourned the case for a hundred years.

## *VI. Greek Legal System*

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6. In the Greek administration of law, the emphasis was less on the strict rules of law than on the general justice of the case. This was inevitable, with a purely democratic judgment rendered alike on law and facts by a multitudinous popular jury without a presiding judge and with no appeal of law. It had several marked consequences. For one thing, it led to the development of forensic oratory.

It is in Greece that this art dawns upon the world. The speeches of the Greek orators in law cases have been studied by successive generations of lawyers in every age and in every country. Indeed, the greater part of the attainable knowledge of Greek law and justice is founded on the texts of these orations that have been preserved. The famous names that come down to us in Greek justice are not the names of judges or jurisconsults, as in the Hebrew and the Roman, the English, the Japanese and the Mohammedan legal systems; but the names of orators. The very term used for an advocate was not lawyer, or jurist, but orator, or "speech-writer"; and the spirit of his whole argument may be inferred from the circumstance that in the very first sentence of the speeches of Lysias and other orators we usually find the identical apostrophe, familiar to our modern courts, "Gentlemen of the jury!" (ὦ ἄνδρες δικάσταί).



## 6. *Advocates*

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It was theoretically expected at Athens that a citizen should plead his own cause; and the "speech-writer" was the person who composed the speech for him. But litigation was popular and multifarious; and a professional class of speech-makers naturally developed. As time went on, it became allowable for the advocate to deliver a speech personally in behalf of the client, on one pretext or another (though not for a fee). But Lysias, who in his day (say B. C. 440-360) was among the most eminent advocates of his class, practised almost exclusively by writing, not delivering, the speeches. Of this extraordinary man, who is credited with some two hundred and fifty orations during his career at the bar, tradition has it that he lost only two cases. An anecdote is told of him that a client once came back to Lysias, dissatisfied with the speech that had been written for him to deliver: "When I read it over the first time", said the client, "it seemed to me admirable; but after my second and third rehearsals, it sounded tame and feeble". "You must remember", replied Lysias, "that the court will hear it only once!" A saying of Lysias which has verity for all time was this: "The laws will be no better than the law-makers".

The Athenian practice of popular justice naturally permitted and encouraged the advocates to employ all the ingenious arts of sophistry and emotional appeal which

## *VI. Greek Legal System*

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would sway a popular court. The rigid control, by instructions of law and review on appeal, which the judge in our own modern system is authorized to impose on such arts, so as to keep the verdict within the bounds of law and fact, were unknown in that system. The trial of Phryne comes down to us as a celebrated illustration.<sup>11</sup> The orator here was Hyperides, a pupil and contemporary of Demosthenes, and some of his speeches have been pronounced to surpass Demosthenes'. Phryne was a celebrated woman of pleasure, accused of impiety in profaning the Eleusinian mysteries; the trial took place about B. C. 340. As the cause progressed, and a verdict of guilty seemed to impend, Hyperides drew the accused into full sight before the tribunal, tore aside her tunic, and bared her breasts (says Athenaeus) "and in a passionate appeal to the jurors invoked their religious scruples to have pity on this priestess of Aphrodite". Phryne was acquitted; but a law is said to have been passed that thenceforth the accused should not be placed in the sight of the jurors at the trial.

Demosthenes may be termed the Daniel Webster of Athens, for although political history claims him as a statesman, yet in professional forensic oratory he holds also a foremost place. A brief passage from one of his lawsuit-speeches may be quoted here, not as exhibiting



VI. 11—THE TRIAL OF PHRYNE

She was defended by the orator Hyperides, who was ranked with Demosthenes by repute

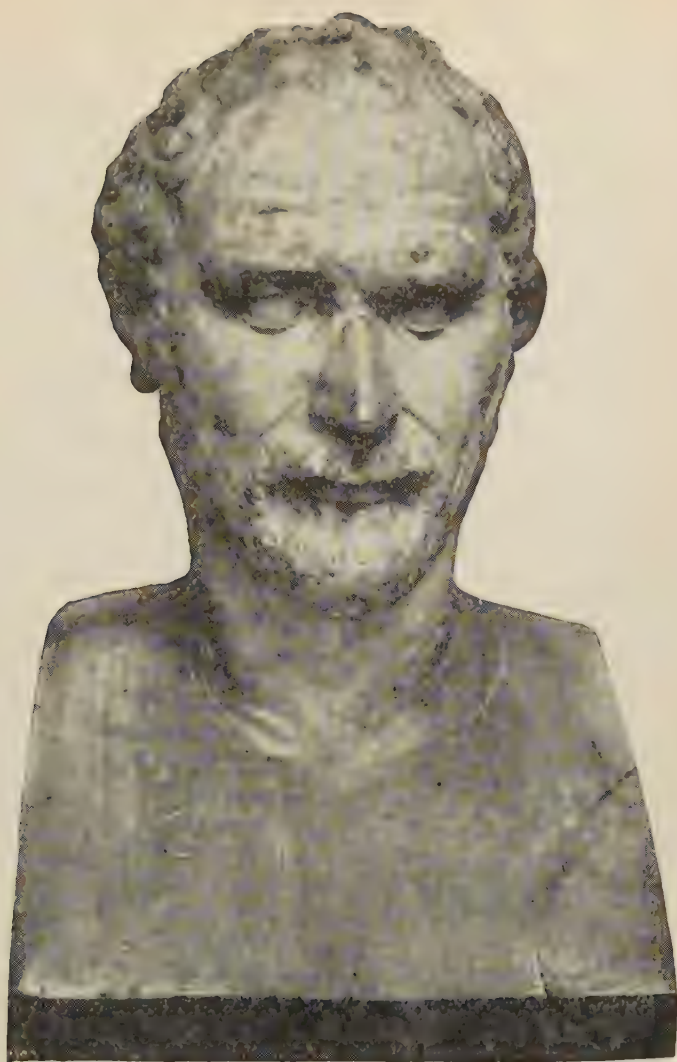
## *VI. Greek Legal System*

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the eloquence which his fame imports, but as illustrating the advanced technique of the Greek advocate in handling a mixed issue of law and fact before a jury.<sup>12</sup> The case was that of *Darius v. Dionysodorus*; the plaintiff demanded repayment of a loan of 3000 drachmas, made for a voyage from Athens to Egypt and return, with a cargo of grain, payable with interest on safe return of the ship to Athens. (It will be remembered that the speech, though written by Demosthenes, reads in the first person of the party-plaintiff):<sup>h</sup>

"I am a partner in this loan, gentlemen of the jury. We who have engaged in maritime trade, and put our money in the hands of other people, know very well that the borrower has the advantage over us in every respect. He receives our hard cash without any mistake, and leaves us a bit of writing and a small scrap of paper that cost two farthings, containing his covenant to do what is right. We do not promise to advance our money, but advance it to the borrower immediately. On what then do we rely, and what security do we get when we part with our money? We rely on you, gentlemen of the jury, and on your laws, which declare that whatever agreement a man enters into voluntarily with another shall be valid.

"It seems to me however, that neither laws nor agreements are of any use, if a person who receives money is not honest in his principles, and does not either fear or respect the rights of the lender. *Dionysodorus* the defendant does neither of these, but has arrived at such a pitch of audacity, that after borrowing three thousand drachmas from us upon his ship, on the condition that his ship should return to Athens, and when we ought to have got back our money in the season of last year, he carried his ship to Rhodes, unloaded his



VI. 12—DEMOSTHENES



## *VI. Greek Legal System*

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cargo there and sold it in violation of the agreement and of your laws, from Rhodes again he despatched the ship to Egypt, and from thence to Rhodes, and even to this day he has never paid us who lent him our money at Athens, or produced to us our security. He has now for two years been making use of our funds, keeping the loan and the trade and the ship that was mortgaged to us, and notwithstanding this he has come into court, with the intention, I presume, of mulcting us with the sixth part of the damages, and putting us in the lodging, besides cheating us out of our money. I therefore, men of Athens, beseech and implore you all to give me redress, if you think I have been wronged. Let me first explain to you how the loan was contracted: that will best enable you to follow the case.

"This Dionysodorus, men of Athens, and his partner Parmeniscus, came to us last year in the month of Metageitnion, and said they wanted to borrow money on their ship, on the terms that she should sail to Egypt and from Egypt to Rhodes or Athens, and they engaged to pay interest to either of those ports, as the case might be. We replied, gentlemen of the jury, that we would not lend to any other port than to Athens, and so they agree to return here, and these terms being arranged, they borrow three thousand drachmas from us upon the ship, on the voyage out and home, and entered into a written agreement to that effect. In the agreement Pamphilus, who is here in court, was set down as the lender: I however, though not named, lent the money jointly with him. And first he shall read you the agreement . . . . .

"In pursuance of this agreement, gentlemen of the jury, Dionysodorus the defendant and his partner Parmeniscus sent off the ship from Athens to Egypt. And Parmeniscus sailed with the ship; Dionysodorus stayed at Athens. For you must know, gentlemen of the jury, these men were agents and confederates of Cleomenes, the governor of Egypt, who, from the time that he received the government, has done immense mischief to your state, and still more to the rest of the Greeks, by buying up corn for resale and keeping it

## 6. *Advocates*

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at his own price; and these men have been acting in league with him. It was done in this way. Some of them shipped off cargoes from Egypt, while others went out in the trading vessels, and others stayed at Athens and disposed of the consignments. Then those who stayed here sent letters to those abroad advising them of the state of the market, so that, if corn were dear with you, they might bring it here; if it became cheaper, they might sail to some other port. It was chiefly owing to such letters and confederacies, gentlemen of the jury, that the price of corn was raised.

“Well; when these men sent off this ship from Athens, they left the price of corn here pretty high; and therefore they submitted to the clause in the agreement, binding them to sail back to Athens and to no other port. Afterwards however, gentlemen of the jury, when the Sicilian vessels had arrived, and the price of corn was falling, and their ship had got to Egypt, the defendant instantly despatches a person to Rhodes to inform his partner Parmeniscus of the state of things here, knowing perfectly well that his ship would be obliged to touch at Rhodes. The result was that Parmeniscus, the defendant's partner, having received his letter of advice, and learned the state of the corn-market at Athens, unships his corn at Rhodes and sells it there! And thus, gentlemen of the jury, they acted in defiance of the agreement, and of the penalty to which they had bound themselves in case of any breach of the agreement, and in defiance also of your laws, which require ship-owners and merchants to sail to the port which they have agreed to, and subject them, in default of their so doing, to the severest punishments.

. . . . .

“You have heard, gentlemen of the jury, what Dionysodorus has done. During the recital of these facts you must have been wondering, I take it, at his audacity, and what he could possibly have relied upon in coming to court. Audacity it is indeed, when a man, having borrowed money from the port of Athens, and having made an express agreement that his ship shall return to your port, or

## *VI. Greek Legal System*

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else that he will pay double the amount, neither has brought his ship home to the Piraeus, nor pays the lenders their money; and when he has landed his cargo at Rhodes and sold it there, and notwithstanding all these acts he dares to look you in the face!

"Now hear what he has to say to this. He says that his ship was disabled on her voyage from Egypt, and that he was therefore compelled both to touch at Rhodes and to unlade his corn there. And for proof he alleges, that he chartered vessels from Rhodes and shipped off some of his goods to Athens. That is one part of his defence. Another is this—He says that certain other creditors have consented at his request to take interest as far as Rhodes only, and it would be hard if we did not consent to the same terms as they did. Thirdly, he says, that the agreement binds him to pay the money if the ship arrives safe, and that the ship has not arrived safe in Piraeus. To each of these pleas, gentlemen of the jury, hear my just reply.

"In the first place, when he says that the ship was disabled, I think his falsehood is apparent to you all. For, if the ship had really sustained this disaster, she would neither have got safe to Rhodes nor have been fit for sea afterwards. She appears however to have got safe to Rhodes, and again to have been despatched from Rhodes to Egypt, and at this very time She is sailing everywhere except to Athens. Is it not monstrous that, when he has to bring the ship home to the Athenian port, he says She was disabled, but, when he wants to unlade his corn at Rhodes, then the same ship appears to be seaworthy? . . . . .

"Upon these points I have said enough. With respect to the creditors who, they say, have consented to receive from them the interest to Rhodes, we have nothing to do with that. If any man has forgiven you any part of a debt, he that you have made terms with has sustained no wrong. We however have not remitted anything to you, Dionysodorus, nor consented to your touching at Rhodes. We consider the agreement to be in force, anything to the

## 6. *Advocates*

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contrary notwithstanding. What says the agreement, and where does it require you to sail? From Athens to Egypt and from Egypt to Athens; in default of so doing, it binds you to pay double the amount. If you have performed this condition, you have done no wrong; if you have not performed it, and not brought your ship back to Athens, you are liable to the penalty in the agreement . . . . If certain persons have excused you anything, and consented for some reason or other to take interest as far as Rhodes, does that exempt you from liability to us, with whom you have committed a breach of your agreement, in landing at Rhodes? I should hardly think so. The jury are not now deciding upon terms consented to by others, but upon a contract entered into by you yourself with us. . . . . Don't listen then to this man, when he attempts to cajole you, and cites his transactions with other creditors as examples for us; but refer him to the agreement, and to the rights which spring out of the agreement. . . . .

"The defendant relies finally upon the fact that the agreement only requires him to pay the debt if the ship arrives safe . . . . Whose fault is it, gentlemen of the jury, that the ship has not come safe to Piraeus? Are we to blame, who lent our money expressly on a voyage to Egypt and to Athens, or Dionysodorus and his partner, who, having borrowed upon these terms, that the ship should return to Athens, took the ship to Rhodes notwithstanding? That they did this voluntarily and not of necessity is clear from many circumstances. For, if the occurrence was really involuntary and the ship was disabled, surely, after they had repaired the ship, they would not have let her for a voyage to other ports, but would have sent her off to Athens, and made amends for the involuntary accident . . . . .

"The facts of the case then, are thus brief and easy to be remembered. We lent to this Dionysodorus and his partner three thousand drachmas on a voyage from Athens to Egypt and back; we have not received payment either of principal or interest; they have

## *VI. Greek Legal System*

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kept possession and had the use of our money for two years; they have not even to this day brought home their ship to your port or delivered it to us. The agreement declares that, if they do not deliver to us the ship, they shall pay double the amount, and that the debt may be recovered from either one or both of them. These are the grounds upon which we have come into court, seeking to recover our money through your assistance, as we cannot get it from these men themselves. Such is our case, gentlemen of the jury

. . . . .

“And besides, men of Athens, do not forget that, though you are sitting in judgment only upon one cause, you are making law for the whole port of Athens; and a large number of commercial people are standing by, to see how you decide this question. For if you hold that contracts and mutual engagements ought to be enforced, and treat with rigour those who violate them, the lenders of money will be more ready to part with what they have, and by that means the trade of your port will be increased. But if ship-owners, after entering into written contracts to sail to Athens, shall be at liberty to carry the ship to other ports under the plea that she has been disabled, and under any other such pretence as these which Dionysodorus sets up, and to apportion the interest according to the length of the voyage which they say they have performed, instead of paying it according to the terms of their agreement, there will be nothing to prevent all contracts of loan being dissolved. For who will like to part with his money, when he sees that written agreements are of no force, while effect is given to pleas like the present, and the excuses of wrong-doers prevail over right and justice? Never allow such a thing, gentlemen of the jury! It is not expedient either for the mass of the people or for the mercantile class, who are a most useful body of men both to the public at large and to those who have dealings with them, and therefore you ought to be careful of their interests.”



## 6. *Advocates*

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Might not this speech, in style and construction, have served equally well for a jury of today trying the same issue?

Perhaps the case most celebrated for the eloquence of the orators, in Athenian justice, was the prosecution of Ctesiphon by Aeschines. Aeschines,<sup>13</sup> who spoke as prosecutor, and rivalled Demosthenes in fame, charged Ctesiphon with illegally proposing that the Assembly should award to Demosthenes a gold crown in recognition of Demosthenes' patriotic services against the Macedonians. The trial was had probably before a jury of one thousand. Demosthenes, though nominally the defender of Ctesiphon, was virtually defending himself and his whole political career. Immense crowds from all Attica thronged into the city to hear the famous rivals. And then was delivered that oration which is handed down, by universal opinion, as the greatest speech of the greatest orator in the ancient world,—Demosthenes' Oration on the Crown. History records its overwhelming success, and the verdict that vindicated him drove his prosecutor into exile.

7. The legislation of the Greek city-states, though copious, has come down to us only in scanty scattered fragments,—sometimes in the original stone inscriptions, sometimes in quotations of laws in the orators' speeches.



VI. 13—AESCHINES

He was the advocate for the prosecution, in the trial which made Demosthenes virtually the defendant

## 7. Legislation

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The earliest of the Greek communities, known to us in definite records, was the large island of Crete, lying in the Mediterranean, on the way from Egypt; and here tradition places the home of Minos, the first Greek law-giver. Minos' date is perhaps 1600 years before Christ; and the throne on which he sat in the royal palace at Knossos, 3500 years



VI. 14—THE THRONE OF MINOS

ago, can now be seen by the traveler replaced in its original spot.<sup>14</sup> Minos, in Greek mythology, received his laws from Zeus, and later plays the part of one of the three judges of souls in Hades.

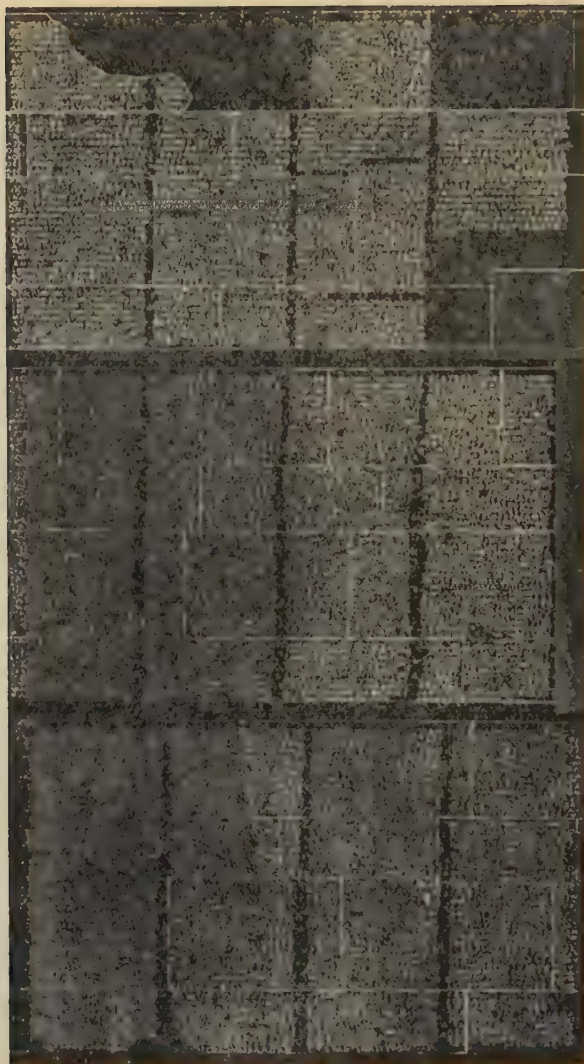
None of the law records of the Minos period have yet been found. But the oldest statute-law now extant belongs also in Crete, about 1000 years later,—the law of the city of Gortyna, dating from perhaps B. C. 400.

This inscription, the largest extant fragment of any Greek law, came to light about fifty years ago; for the

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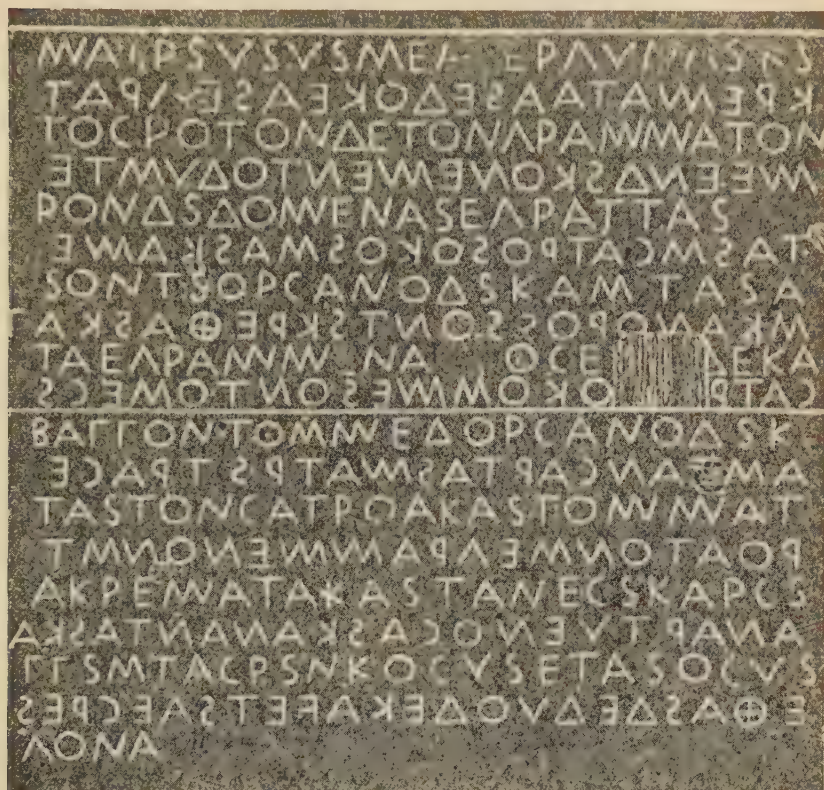


VI. 15—CITY-LAW OF GORTYNA, B. C. 400

The restored original forms an oblong horizontal stone wall, 30 feet long. As here divided, to fit the book-page, the lowest third is the left-hand end. The topmost third, forming the right-hand end, shows where stones are missing



## 7. Legislation



VI. 16—GORTYNA LAW (enlarged sample)

The Cretan writing, in those days, read from left to right (in the top line), then turned and read from right to left, and so on

stones on which it was chiseled had become buried for two thousand years or more; and its discovery made a sensation in the learned world. It was about thirty feet long in its original form;<sup>15</sup> the broken pieces are now scattered in



## VI. Greek Legal System

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several museums; but a plaster facsimile of the whole is preserved in the Academy of the Lynx at Rome. The inscription illustrates, on closer view, that at that period of literature the Cretan writing ran in alternate lines from left to right and then from right to left; turning about, as the ox turned in ploughing furrows; hence the term "boustrophedon" for this style of writing.<sup>16</sup>

The first paragraphs of this law prescribe the mode of trying an issue of personal freedom, or slavery; the later ones deal chiefly with the inheritance of property. A few passages will illustrate the fairly primitive style (and it will be noted that the Twelve Tables of Rome, attributed to about the same date, and reputed to have been drafted on a Greek model, represent a style only a little more primitive).<sup>1</sup>

[*City Laws of Gortyna.*] [1] "Whoever claims for his own another person, whether free or slave, shall not distrain him before suit. If he does, he shall be adjudged to pay for such distraint 10 staters to the freeman or 5 staters to the slave, and to release him within 3 days. If he does not release him, he shall be adjudged to pay, for each day of delay, 1 stater to the free man or 1 drachma to the slave. The time shall be determined by the judge's oath. If he denies the distraint, the judge's oath shall determine, if there is no witness. . . .

[25] "To the father belongs the power over the children and the property, and he may make partition of the property; and the mother likewise as to her own property; but while they live partition is not demandable. But if one child is adjudged liable to pay to

## 7. *Legislation*

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some one, the prescribed share may be allotted to the child so adjudged.

[26] "If a man dies, his town houses and all therein, except such houses as occupied by serfs attached to the rural lands, and the sheep and large cattle, except those in a serf's possession, shall go to the sons. All the rest of the property shall be divided, as fairly as may be, two parts to each son however many there are, and one part to each daughter, however many there are.

[27] "The mother's goods also shall be divided, if she dies, in the same manner as the father's. . . .

[31] "If a man or a woman dies, and if there exist children, or children's children, or the latter's children, this group shall have the property. And if none of these exist, then the deceased brothers and their children and the latter's children, this group shall have the property. And if none of these exist, the sisters of the deceased and their children and the latter's children; this group shall have the property. And if none of these exist, then the other relatives whoever they are, this group shall have the property. And if no other relatives exist, all those who are the household's serfs, these shall have the property . . . .

[36] "While the father lives, the father's property shall not be sold nor mortgaged by the son; but what the son has himself earned or received by partition he may dispose of as he pleases. Nor shall the father dispose of property earned by the children or partitioned to them, nor the husband dispose of nor bind the wife's property, nor the son the mother's.

[37] "If any one buys or takes in mortgage or receives an obligation on property other than as prescribed herein, the property shall remain in the mother or wife, and he who has [fraudulently] sold, mortgaged, or promised it shall pay double to the vendee, mortgagee, or promisee, and the full amount of any other loss caused; but transactions prior to this law shall not be adjudged by

## *VI. Greek Legal System*

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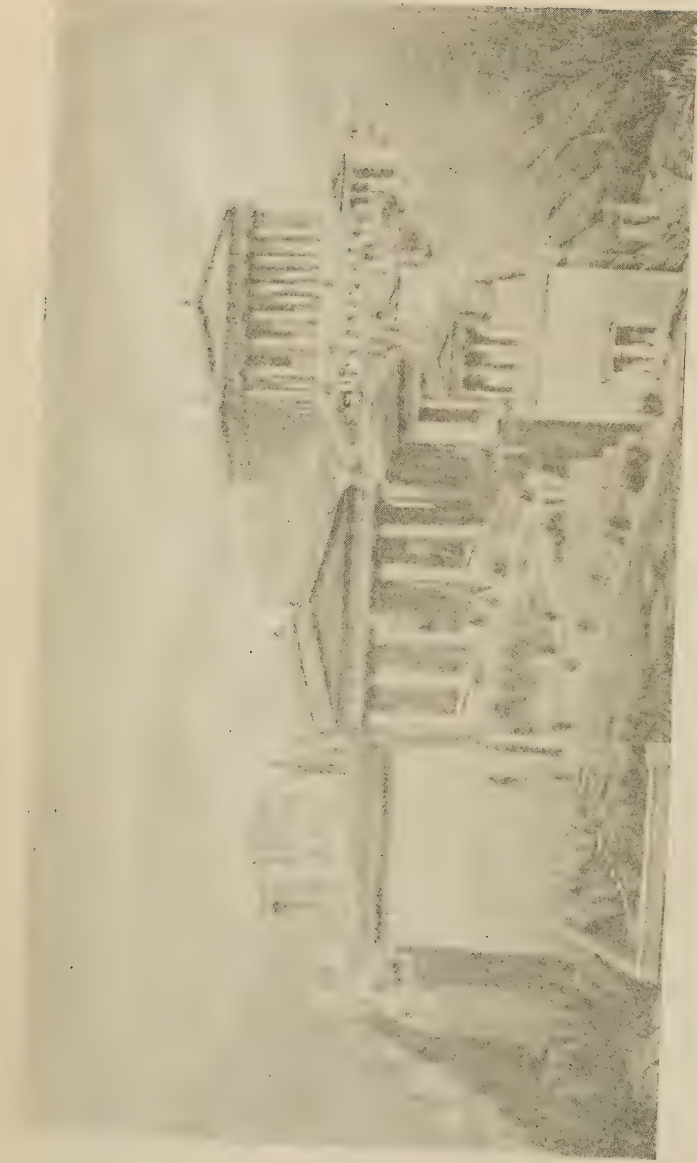
it. If the opponent [in a proceeding under this law] disputes that the property belongs to the mother or wife, the claim shall be adjudicated before the court having jurisdiction.

[38] "If a mother dies leaving children, to the father belongs the power over the mother's property, but he shall not dispose of or mortgage it, unless the children consent, being of age. And if any one buys or takes a mortgage contrary hereto, the property shall remain in the children, and to the buyer or mortgagee he who has [fraudulently] disposed or mortgaged shall pay double the sum, and also the full amount of any loss caused.

[39] "If the father marries another woman [after the first wife's death], the children shall have the power over their mother's property".

The name of Solon, the legislator (who lived about B. C. 600), is forever associated with the laws of Athens. Solon typifies the thorough democratization of Athenian law and justice. It was that wise old statesman who, when asked by a friend whether the laws he had framed for the people of Athens were the best possible, answered, "Yes,—Yes, indeed, the very best—that they could endure!" In Solon's time the laws passed by the Assembly were publicly preserved in wooden or bronze or stone tablets on the Acropolis,—the crowning glory of Athens.<sup>17</sup> Particular laws of Solon, and numerous other separate laws or statutes of Athens, and the other city-states, are frequently quoted in the orations still extant; but only a few minor ones have survived the ravages of time in their original records.





VI. 17—THE ACROPOLIS



## 7. Legislation

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The following law of Solon, quoted in one of Demosthenes' speeches, illustrates the style of enactment in Solon's period:<sup>1</sup>

"If a man has recovered the article which he has lost, the thief shall be condemned to pay the double value; if not, to pay tenfold, besides the cumulative penalty; and he shall be kept in the stocks five days and as many nights, if the jury-tribunal shall have imposed such sentence. And any person who likes may propose the additional penalty, when the question of a penal sentence is before the court. And if any one is taken off in custody after conviction for ill-treatment of parents, or for desertion, or for entering where he has no business to enter after notice of exclusion from legal privileges, the Eleven shall put him in prison and shall bring him before the jury-tribunal; and any one that pleases, to whom such right belongs, may prosecute; and if the party accused be convicted, the jury-tribunal shall determine what penalty, corporal or pecuniary, he shall suffer; and if he be sentenced to a pecuniary penalty, he shall be imprisoned until he has paid."

But by the time of Demosthenes, two and a half centuries later, legislative draftsmanship had developed a high degree of technical phraseology. The following law, the subject of Demosthenes' attack in the above-mentioned speech, had recently been passed on motion of Timocrates the defendant:<sup>2</sup>

[*A Greek Enactment*, B. C. 300.] "In the first presidency, to wit, that of the Pandionian tribe, on the twelfth day thereof, Timocrates moved: If any of the persons who are indebted to the State has been or shall hereafter be condemned, pursuant to a law or to a decree, to suffer the penalty of imprisonment, it shall be lawful for him, or for another person on his behalf, to put in such bail for the

## *VI. Greek Legal System*

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debt as the people shall approve, to be security for payment of the sum which he owed, and the committee of council are hereby required to take the votes of the assembly, when any one wishes to put in bail; and the person who has given bail, if he pays to the State the money for which he gave the bail, shall be released from imprisonment; but if neither he nor his bail shall have paid the money in the ninth presidency, the party released on bail shall be imprisoned, and the property of the bail shall be confiscated. Provided that, in the case of farmers of the taxes and their sureties, the State shall be at liberty to recover her dues according to the established laws. And if any one is indebted in the ninth presidency, he shall pay his debt in the ninth or tenth presidency of the following year."

The speech prepared by Demosthenes on this occasion serves to illustrate the unique machinery of legislation which had developed in Athens under government by mass-rule without a senate or a judiciary. Its peculiarity was this: Instead of the system of "checks and balances" supplied in modern times by separation of departments, second chambers, and constitutions controlling statutes, the expedient was devised of making the mover liable to prosecution at a later assembly for proposing unconstitutional legislation. It was in a prosecution of this kind that Demosthenes delivered his great oration on the Crown already mentioned; he was defending the author of a resolution awarding him a gold crown for his patriotic services.<sup>18</sup> The method is thus described:<sup>k</sup>

"The process of legislation in Athens involved the services of a group of dicasts [or, citizen-jurors]. Once a year the assembly con-

## 7. Legislation

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VI. 18—DECREE PROPOSED BY DEMOSTHENES.  
B. C. 339

This is the only extant inscription of any of Demosthenes' decrees.

sidered the advisability of accepting proposals for changes in the laws. If the vote was favorable, all suggestions for changes, together with the laws to be abrogated or amended, were posted in the market-place and filed with the clerk of the assembly, who read them at the two succeeding meetings. The assembly then made provision for the selection by lot of a group of dicasts called 'nomothetes', or legislative commissioners. The number varied. Commissions of five hundred and of one thousand are mentioned. The proceedings were the same as in a regular court. It was the duty of the commissioners to listen to the proposer of the new law or amendment, to the five public advocates appointed to defend the law impugned, and to any other citizens who cared to speak on either side. The issue was decided by a majority vote. During one year after the passage of a new law the mover was liable to indictment and punishment for unconstitutional legislation. The unconstitutionality might consist either in the character of the legisla-

## *VI. Greek Legal System*

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tion or in the failure to observe the procedure provided by law. The penalty was assessed by the jury and might be severe. After the expiration of a year the mover was free from personal liability, but the law could be attacked at any time. The process of legislation was a fruitful source of litigation. The indictment for unconstitutional legislation was the favorite political weapon of the fourth century. Litigation was the handmaid of politics. Aristophon, a prominent politician contemporary with Demosthenes, is said to have boasted that he was indicted seventy times for unconstitutional measures."

8. The transactional instruments of Greek practice, which have come down to us in full textual terms, are scanty,—a few score, in comparison with the thousands from Egypt and Mesopotamia; but they reveal an elaborate development. The variety of types represented is also smaller; but the carefulness of concrete detail, the prevision of contingencies, and the practicalness of the measures provided, show that Greek commercial experience and Greek intellectual keenness had already developed a standardized conveyancing which marked a decided advance over any of the earlier systems.

Let us glance at four typical instruments,—a land-transfer record, a land-lease, a loan, and a contract of drainage.

(a) Many or most of the Greek cities had established record-offices where the transfers of land must be entered in abstract. The following entries are from a record

## 8. *Conveyancing*

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found at Tenos, dating about B. C. 200, and containing some fifty entries; the standardized form is noticeable:<sup>1</sup>

[*Land-Transfer Record.*] . . . "Antichares, son of Euporion of Thryese, has bought of Pasiphon, son of Peirios of Donakea, the house and lands located at Eleonte, with the appurtenances of the said lands, and the water, to which the abutters are . . . . ., bounded by the road leading from the suburb to the watch-tower and below, the whole being the same property bought by Pasiphon from Simos son of Anaxicles; consenting are N. daughter of Antipater of Thryese, and N. daughter of the said N. of the Phykean tribe, and their guardians Antichares son of Euporion of Thryese, and Celophanes son of Cleotheos of the Eleithyeon tribe, for five thousand silver drachmas". . . .

"Artymachos, son of Aristarchos, a Heraclidean, has bought of Telesicles son of Eucles a Heraclidean the house and lands located at . . . . . being the share of property inherited by Telesicles from his father and the further property bought by him from his brother Calliteles, to which the abutters are Pleistarchos and Artymachos, together with all the appurtenances belonging to Telesicles and Calliteles, the water-channels existing in the said lands, and a fourth part of the watch-tower, the cistern in the tower and the tiled roof belonging to Telesicles, as well as the house and the orchard bought by Telesicles from Euthygenes, also the pottery in the houses and the millstone and the mortar, for thirty-seven hundred silver drachmas. Warrantors of the sale [naming nine persons]; all bound jointly and each for the whole".

(b) The following lease was made about B. C. 350, as the result of a lawsuit brought by the people of Heraclea to eject a number of persons who had encroached on the cultivated lands of the city's Temples of Dionysos and of



## *VI. Greek Legal System*

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Athena Polias. The city first ordered a re-survey of the lands, and then proceeded to lease them out, on a tenure virtually emphyteutic (or, copyhold). The whole transaction was then inscribed on tablets of bronze.<sup>19</sup> The lands were classified into four lots, and the leases of the first lot ran in these terms:<sup>m</sup>

[*Lease.*] "In the mayoralty of Aristion, month of Apelleos, the city and the wardens [naming three persons] and the survey-commissioners [naming five persons] do lease the sacred lands of Dionysos, as now held by them, for life, on the terms decreed by the people of Heraclea: [1] The lessees shall take the fruits thereof for all time, so long as they shall give security and pay the rent annually in the first ten days of the month Panamos; if they choose to pay in advance [of the crop] they shall deposit in the public granary and measure by public scales, before the grain officials annually elected, the full amount of barley clean and merchantable equal to the product of the land leased. [2] They shall furnish for each term of five years, to the warden in office in that year, sureties acceptable to the said wardens. [3] If the lessees assign to any other person the land leased, or devise or sell the right to the produce, the assignees, devisees, or purchasers shall furnish sureties in the same manner as the original lessees. [4] Any lessee who fails to furnish surety or pay rent as provided shall pay to the wardens and the grain-officials a double rent for the current year and also all the value lost [by a re-lease], that is to say, the difference between the amount of rent for the first five years of the new lease and the amount due for the same period under the old lease, and furthermore all plantations and buildings put upon the land shall be the property of the city."

"The mode of cultivation shall be as follows: [5] The lessee of the first lot [. . . describing it] shall plant in vines at least 10 rods,



VI. 19—LEASE AT HERACLEA, B. C. 350

This lease, containing some seventeen paragraphs, covered one of four lots of land belonging to the city of Heraclea

## *VI. Greek Legal System*

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and in the part suitable for olives, shall plant at least 4 feet of olives per rod. If the lessee claims that the land will not grow olives, the wardens for the time being, calling in such citizens as they see fit, shall make a sworn survey and shall report to the city assembly, comparing the soil in question with that of adjacent lands. [6] The lessees shall maintain all trees thereon. Trees which die of old age or are overthrown by the wind shall belong to the lessees. [7] They shall be ready with all trees, plantations, and perennials, in number equal to those described in the contract, every fifth year beginning with the year after the [current] year of the mayoralty of Aristion. If the plantations have not been made according to contract, the lessees shall be adjudged to pay 10 pieces of silver per foot of olives and 2 minas per rod of vines. The wardens for the time being, after calling upon at least 10 citizens selected from the people, shall examine whether the lessees have planted according to contract. They shall enter in their report the names of those planting and the number of trees planted, also the names of those who have failed to observe the terms of the contract, and shall proceed to collect the penalties as well as the rent due. [8] If any person appropriates the temple lands and pastures and animals therein, or removes anything, destroys, breaks, or saws timber, or commits other waste of that sort, the lessee shall proceed against him for the heaviest penalties, and the fine imposed shall go to him. [9] The canals and ditches on the said lands shall not be deepened nor drained nor dammed, either to increase the flow therein or to divert it; the lessees shall as often as needed dredge those that traverse their respective lands; the roadways shall not be cultivated, nor shall they be fenced or obstructed for passage. In case of violation of these provisions, the wardens for the time being shall fine or cause them to be fined until they observe the terms of the contract. [10] The lessee shall neither destroy nor cut nor saw any tree, neither himself nor any one on his behalf; he shall make neither mound nor hole other than those now on his plot; he shall neither open nor allow to

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be opened any quarry in the temple land; otherwise he shall be deemed guilty of profaning sacred land. [11] He shall build on the land buildings as follows, a cattle-stable, a shed, and a barn; the stable to be 22 feet long by 18 feet broad, the barn not less than 18 feet long by 15 feet broad, the shed 15 feet each way, the same to be finished, enclosed, and roofed within the period above provided for the plantations; failing which they shall be adjudged to pay a penalty of 6 minas for the stable, 4 minas for the barn, and 3 minas for the shed. [12] The brushwood and undergrowth they shall neither sell nor cut nor burn; nor allow another to do so; failing which they shall be liable according to the law and the contract; provided that they may make use of timber for construction and for vine-poles, and may cut dead wood as needed for household uses; no lessee to take brushwood or undergrowth other than from his own plot. [13] The vines and fruit trees dying of old age are to be replaced by the lessees so that their number be always equal to contract. [14] The lessees shall not mortgage nor hypothecate the said lands, whether buildings or ground, otherwise they shall be liable according to law. [15] If a lessee die without children or will, the city shall have the entire enjoyment of the premises. [16] If the lessees are evicted by reason of war, so as to lose enjoyment of the lands, the lease shall be cancelled, on terms to be decided by the people of Heraclea, and neither the lessees nor their sureties shall be liable under this contract. [17] The sureties given from time to time shall be responsible for rents, penalties, loss of value on release, and for judgments; they shall be liable both in person and in property as proved by witnesses; they shall not be entitled to dispute any liability of the lessee, nor to evade indirectly any claim of the city or its representatives."

Who can doubt that this instrument represents a long accumulation of experience in technical draftsmanship and legal maneuvers?



## VI. Greek Legal System

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(c) The high degree of development of Greek banking is well known. In its legal aspect, the forms of obligation kept equal pace. In the following contract (one of five), dating about B. C. 200, a banker of Naxos lends money to the city of Arkesine, the city assembly having authorized commissioners to negotiate the loan:<sup>n</sup>

[*Loan.*] "May Good Fortune be upon us! [1] In the month Hecatombeon, at Naxos, the mayors being . . . and Sostratos, and in the month of Miltophorion, the mayor being Ctesiphon, Praxicles son of Polymnestos has loaned to the city of Arkesine three talents of Athenian silver, with no risk whatever for Praxicles, at interest of five obols per mina per month, Portomachos and . . . having come as loan-commissioners pursuant to a resolution of the assembly passed on motion of Stesagoras. [2] Praxicles has been given a lien on all the common property of the city and upon the individual properties of the citizens of Arkesine and of its inhabitants alike on land and on sea. [3] Interest is to be paid annually by the treasurers charged with collecting the revenues of Arkesine; in default of payment, the treasurers who default shall be liable to levy and execution by Praxicles, who shall be entitled to realize from their individual property one and a half times the amount due, by the usual modes of execution, as if judgment had been rendered therefor, pursuant to the treaty between the Naxians and the Arkesinians; and such sum shall not be deducted from the amount of the loan, but the city shall notwithstanding pay the interest, and if not, the interest unpaid shall be added to the capital sum and bear like interest payable annually. [4] The principal sum shall be payable within six months after demand by Praxicles or by his agent authorized thereto. [5] All payments, both of principal and



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interest, shall be made at Naxos, to Praxicles or a person authorized by him, in coin of Athens or Alexandria current in that city, of full weight and good alloy, net and free of charge, as may be demanded by Praxicles. [6] In case the capital sum is not paid as provided herein, the Arkesinians herewith agree and contract that they owe to Praxicles six talents; Praxicles shall be entitled to recover this amount by the usual methods of levy upon all the common property of the Arkesinians and upon the individual property of the Arkesinians as well as of the inhabitants thereof, both from each and every one the whole sum, as well as from all, in the same manner as if judgment had been given against them in the court of arbitration as provided in the treaty between the Naxians and the Arkesinians, and free from any liability for taking such measures; and nothing so taken or seized by Praxicles shall be credited to the Arkesinians as payment on the sum due and unpaid. The Arkesinians shall impose no penalty, nor make any hindrance, [neither to himself] nor to any other persons so taking property by order of Praxicles. If any citizen of Arkesine or inhabitant thereof lays hands on those acting herein for Praxicles, or hinders his levy, on any pretext whatever, he shall pay to Praxicles one talent of silver, and this sum shall be recoverable from him as if judgment had been rendered for Praxicles in the court of arbitration as provided in the treaty, and this amount shall not be credited to the city as payment on the loan. If any loss or damage is incurred by Praxicles by reason of this levy on property, it shall be charged to the city of Arkesine, and the whole amount of it shall be paid with the rest of the loan. [7] It is agreed by the Arkesinians that nothing shall overthrow this contract, and that neither law nor vote nor decree nor mayor nor other officer shall rule otherwise than as provided in this contract, nor shall anything whatever on any ground or pretext avail against it, but this contract shall control wherever invoked, whether by the lender or by those acting for him. [8] The Arkesinians agree that this contract

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shall be inscribed and published at Arkesine [in the temple of . . . .] on a marble pillar within sixty days after receiving the report of the loan-commissioners; and if not, to pay a forfeit of . . . . as provided in the contract now in the hands of Eurycles.

“[Signed] Praxicles

Witnesses: Eurycles [and six other names].”

It would seem, from the closing provisions of this instrument, providing for confession of judgment by the debtor, and for validating the contract against any impugnement by statute or court, that the draftsmanship of Greek creditors had already discovered most of the safeguarding devices which modern ingenuity employs in our own transactions.

(d) One of the most technical fields of legal draftsmanship is that of contracts to improve real estate, especially contracts for public works. In the following instrument,<sup>20</sup> dating about B. C. 300 (discovered in 1860, and now at Athens), the city of Eretria contracted for the draining of a marsh; the undertaker was here an alien, probably a professional in his line; the instrument was inscribed on marble slabs:<sup>o</sup>

[*Contract to Drain a Marsh.*] “Following are the terms by which Chaerephanes engages with the Eretrians to divert and drain the marsh at Ptechae:

“[1] The contractor shall bear all expense of the work of drainage, but he shall be exempt from import and export dues on materials necessary for the work, and this shall cover imports of all



VI. 20—CONTRACT TO DRAIN A MARSH, B. C. 300

This contract, inscribed on marble slabs, was discovered in 1860, and is now at Athens

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stone and wood needed for the work, as . . . . . customary for public undertakings. [2] When he shall have drained the marsh, he shall enjoy the use of the land of the marsh, paying thirty talents rent, for ten years, payment to be made to the city in instalments each year. [3] Chaerephanes shall drain the marsh within four years at most, the time of this contract to begin from the year after that in which Hippokydes and his colleagues are in office, and the period of four years to begin from that time. [4] Chaerephanes shall be exempt from all dues on sales of produce from such land, if sold in Eretria and not exported. [5] The citizens bind and engage themselves to Chaerephanes, by oath taken in the temple of Apollo Daphnephoros, to let him enjoy the use of these lands for thirty talents during ten years, from when he shall have drained the marsh, this contract to be inscribed on a stone tablet containing the contract and the oaths and all other matters, and to be placed in the temple of Apollo Daphnephoros. If during the work a war shall hinder Chaerephanes from completing the drainage as provided herein, then when it shall be feasible [to resume] on return of peace, he shall be allowed an additional time equal to the duration of the war. If later a war intervenes and it shall not be feasible to enjoy the use of the marsh-lands, . . . . . an additional time, equal to that of the war, shall be allowed when use can be resumed. [6] Chaerephanes shall be entitled to dig underground conduits under lands that are individual property, but he shall not dig until paying therefor. At the line of the marsh, if adjacent land is needed, he shall pay at the rate of one drachma per foot, at the time of doing the work. [If he makes drain-ditches], he shall carry them around cultivated land and shall preferably carry them through land not cultivable. For the discharge of ditches, he shall construct a basin not to exceed two square stadia in area. During the period of occupation of the leased land, he shall care for the upkeep of the underground channels and all others, and shall maintain all in good condition. He shall erect a fence around the basin, and at the point of exit of water from the basin to the under-



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ground channel, he shall construct a . . . . . so that when the water accumulates the farmers who need it may close the entrance to the channel and make use of the water without . . . . .  
. . . . . [7] If Chaerephanes dies before draining the marsh, . . . . this contract shall be binding with his heirs. [8] If any person, whether private citizen or official, by writing or by vote, proposes to annul this contract, or compels Chaerephanes and his associates to break this contract, on any ground or pretext whatever, he shall be disfranchised, his property forfeited by attainder to Artemis, and he himself and his family shall suffer outlawry. [9] Chaerephanes shall give sureties who will engage by oath that when he shall have drained the marsh the said marsh shall be dry, and that he shall pay the thirty talents for the enjoyment of the land. [10] [Execution by the City] The councillors having recommended [the foregoing terms], the council and the people voted that the terms of the contract with Chaerephanes should be inscribed, both the foregoing terms and the following [additional ones]:

“During the progress of the work for the city, the contractor shall be exempt from interference by process both on land and on sea, in war and in peace, both Chaerephanes himself and all those engaged in the work with him. This exemption shall apply to Chaerephanes and to all engaged with him in the work from time to time; provided that if any third person has a right of attachment against the city, this shall not be exercised against those working with Chaerephanes before they have settled their accounts with the city.

“Sureties: [follow five names]

“[11] The councillors having recommended, the council and the people approved, that all the citizens shall bind themselves to Chaerephanes by oath at the temple of Apollo Daphnephoros, and whoever shall not make oath shall be disfranchised. . . . [Then follow some details of the oath-procedure]. The oath shall be as follows: ‘I swear by Apollo and Latona and Artemis to let Chaere-



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phanes enjoy the use of the land of the marsh on the terms of the contract made by the city concerning said marsh; if any person breaks the contract with Chaerephanes, I shall oppose him to the extent of my power, pursuant to our common oath. If I observe my oath, may many good things come to me, and if I break it, may I be ruined, I and all my property'. [Then follow further provisions to carry out par. 8 above.] [12] "Counterparts of this contract shall be . . . . [deposited] at Megara and at Andros. [The above] vote of the people . . . ."

It is known that the Eretrians, in their period of prosperity, once celebrated the festival of Artemis with a procession of three thousand soldiers, six hundred horsemen, and sixty chariots. We can accept this contract (evidently the product of standardized experience) as representative of the development of the technique of conveyancing in a hundred busy small city-states of Greece, by the period B. C. 300. A stage far beyond that of Egypt and Mesopotamia has here been reached.

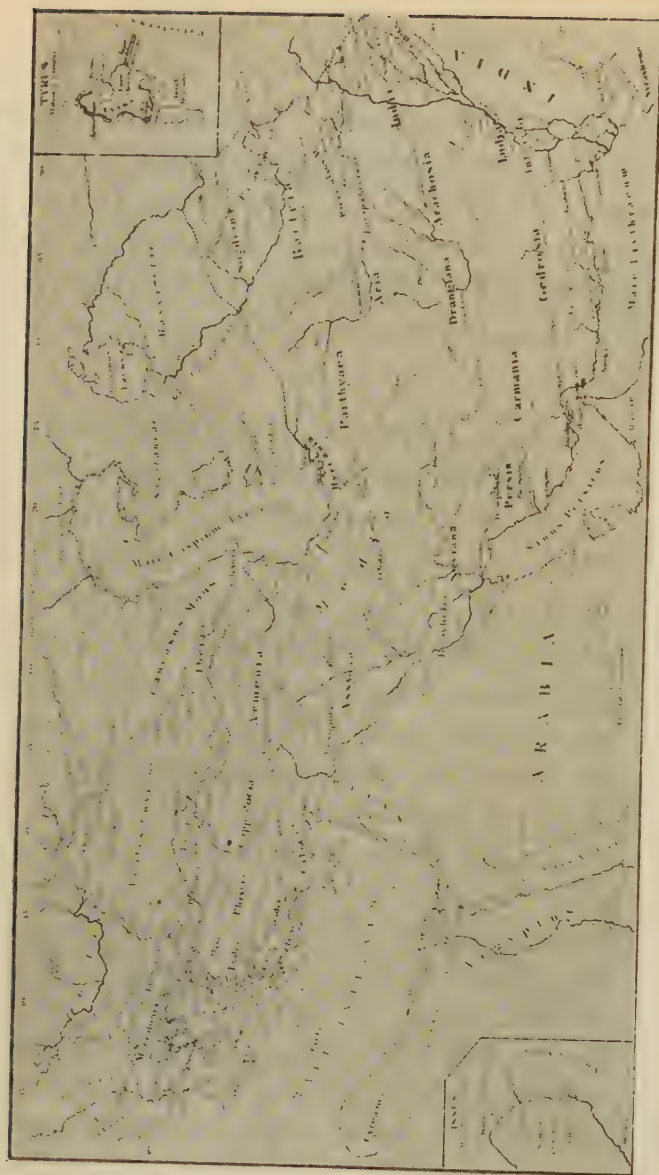
9. But with all this wealth of advanced types of transactional forms, there is still something lacking. Looking back over the Greek records, and comparing them with those of the peoples that preceded and followed, the truth seems to be, that though the Greeks had a system of justice, it can hardly be said that they had a system of law,—in the Roman and the modern sense of the term.<sup>p</sup> They constructed no codes. They reported no reasoned decisions. They wrote no doctrinal treatises. They de-

## 9. *Greek Legal Science*

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veloped architects, philosophers, sculptors, and painters; but no professional judges or jurists. Their one juridical contribution, the popular jury-court, took a form most susceptible to caprice, and essentially incompatible with any science of law. They lavished their wealth on temples (witness the temples at Olympia); but not, as the Romans did, on court-houses.

The Greek mind exhibited a genius for the fine arts,—a passion for politics,—an infinite faculty for philosophy,—and a leadership in literature. But, relatively, these talents found no aptitude for jurisprudence. Their temples, their statues, their dramas, are models for all time. Their experience in politics still has lessons for us today. Their speculations in philosophy leave little for modern thought to invent. The Greek language was carried by Alexander's conquests eastward and southward, over almost the then known world;<sup>22</sup> and in Egypt it came to be employed as the vehicle of philosophy, of religion, and of law, under Roman rule, for seven centuries after Alexander's empire had fallen; so much so that, by the recent copious discoveries of Egyptian papyri applying Roman law in the Greek language, the modern study of Roman law has been almost revolutionized. In short, Greek legal science, had such a thing existed, was in a most favorable position to survive and to serve as a model for ensuing nations.



VI. 22—MAP OF ALEXANDER'S EMPIRE

## 9. *Greek Legal Science*

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But Alexander's vast empire left surviving it no permanent monument of Greek law. Even the ruins of the Parthenon are still zealously studied and measured by modern architects. Every scene of Greek tragedy, and every school of Greek philosophy, must be familiar to modern masters in those fields. And the resurrected texts of Roman law are still perused by thousands of students in every country as the ultimate source of a large part of the world's law today. But Greek law now interests only the historian and the philologist.

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### Sources of Illustrations

1. *Map of Greece.* From the map in *Helen Zimmern*, "The Greek Commonwealth", appendix (Oxford, Clarendon Press, 1915).
- 1a. *Trial Scene on Achilles' Shield.* From a drawing made for the author in 1930 by *Dana D. Corrough*, architect, of Highland Park, Illinois.—Correspondence with Greek scholars in many quarters revealed no authoritative or satisfactory representation of this scene yet published. In "Revue Archéologique", March–April, 1901, p. XXXVIII, in an article by M. Moret, "Quelques Scènes du Bouclier d'Achilles", is shown a vase-picture of the entire shield, but the individual scenes are obscure in detail. In Murray's "History of Greek Sculpture" (2d ed. 1890), vol. I, p. 42, there is another sketch of the entire shield, but the details are obscure. Gérard in 1927 painted "Thétis portant les armes forgées par Vulcan", but the shield-designs were a minor matter.
2. *Temple of Themis.* From the illustration in "The unedited Antiquities of Athens", chap. VII, plate 2, ed. The Society of Dilettanti (Longman, London, 1817).
3. *Death of Socrates.* From a photograph, furnished by the New York Metropolitan Museum of Art, of the painting in that Museum by *Jacques Louis David*, in the Catherine Lorillard Wolfe Collection.
4. *Aristotle's Government of Athens.* From the facsimile of the original in the British Museum, edited by *F. G. Kenyon* (London, British Museum, 1891).
5. *Juryman's Ballot.* From the illustration in *Morgan's* "Orations of Lysias", p. XLIII.
6. *Market-place at Athens.* From the illustration in *J. A. Harrison*, "The Story of Greece", frontispiece (New York, Putnam, 1890).
7. *Trial of Phidias.* From the facsimile in *Jules Nicole*, "Le procès de Phidias", appendix (Geneva, Kundig, 1910).
8. *Statue of Athena.* From a photograph by *Homer H. Kingsley*, Evanston, Illinois.
9. *Pericles Addressing the Assembly on the Pnyx.* From a reproduction, by the McIntosh Stereopticon Co., of an unidentified painting.
10. *Trial of Orestes.* From the drawing in *Walter Crane*, "Echoes of Hellas" (London, Marcus Ward, 1887).
11. *Trial of Phryne.* From a photograph by *Giraudon*, Paris, of the painting by *J. L. David*, in the Musée Dobrée, at Nantes.
12. *Demosthenes.* From a photograph of the original in the Vatican Museum.



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13. *Aeschines*. From a photograph of the original in the Vatican Museum.
14. *Throne of Minos*. From a photograph by *Charlotte W. Lytle*, published in "The Mentor", April, 1924, p. 47.
- 15, 16. *Gortyna Inscription*. From a photograph of the original cast taken for the author by the Director of the Academy of the Lynx, at Rome, 1923.
17. *Acropolis*. From the engraving in "Bilder-Atlas", vol. V, plate 6 (Leipzig, Brockhaus, 2d ed., 1875).
18. *Decree of Demosthenes*. The view shown is the text, not of the proposal for a crown to Demosthenes but of another Athenian enactment, B. C. 339, proposed by Demosthenes, for conferring honorary citizenship upon certain Megarans. This is the only extant inscription of a proposal by Demosthenes; for, after he was exiled, all decrees bearing his name were destroyed, and this one escaped in part only. The original is in the Musée Calvet, at Avignon (Catalogue of 1924, p. 42). Facsimiles of it are given in *Emile Esperandieu*, "Inscriptions antiques du Musée Calvet", Avignon, 1899; *Théodore Reinach*, "Revue des Etudes Grécques", 1900, p. 58, pl. 2 (from which the photograph here is taken); *Salomon Reinach*, "Repertoire et Reliefs Grecs et Romains", Paris, 1909.
19. *Lease*. From a photograph, furnished by the Director of the National Museum at Naples, of the original inscription, known as the Tabulae Heracleenses.
20. *Contract to Drain a Marsh*. From a photograph, furnished by the Librarian of the University of Illinois, of a facsimile published in the "Archaeologike Ephemeris" (Athens), 1869, II series, vol. 13, No. 404, page 317, plate 48.
22. *Map of Alexander's Conquests*. From the map in *F. W. Putzger's* "Historischer Schul-Atlas" (Leipzig, 16th ed., 1890).

## Sources of Documents quoted in Text

- aa. (Prologue): *Moore*, "Judaism," vol. I, page 235 (cited *ante*, chap. III).
- a. Homer's Description of the Shield: The Iliad, book XVIII. The most convincing of the many interpretations of the trial scene is that

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set forth by *F. H. Gillingham*, M. A., in the *Durham (England) University Journal*, vol. XXIV, 1925, p. 308, "The Trial Scene on the Shield of Achilles" (a paper read to the Northumberland and Durham Classical Association, Feb. 10, 1923). The present translation is based on that interpretation; lines 3-7 are the crucial ones.

- b.* Authorities have differed as to the majority number of votes, owing to variant readings of the text in Plato's "Apology", ch. XXV; one reading would make it six.
- c.* Aristotle's Government of Athens. From the translation by Sir *Frederic G. Kenyon*, "Atheniensium Respublica", cc. 63-69 (Oxford, Clarendon Press, 1920). Another translation, differing in the later paragraphs, is given in *H. Rackham*, "Aristotle, The Athenian Constitutions", p. 171 (Loeb Classical Library, 1931).
- cc.* Lucian's Trial. From his "Double Indictment", transl. *A. M. Harmon*, in "Lucian", vol. III, p. 85 (Loeb Classical Library, 1921).
- d.* Greek Jury System. From *Charles Rann Kennedy*, "The Orations of Demosthenes", vol. IV, app. VI, p. 361 (London, George Bell & Sons, 1909).
- e.* Athenian Court. From *Mitchell's* edition of Aristophanes' Wasps, quoted in *Wm. Forsyth*, "Hortensius", p. 26 (3d ed., 1879).
- f.* Athenian Juries. From *W. S. Ferguson*, "The Fall of the Athenian Empire: Law and Politics in Athens" (Cambridge Ancient History, 1927, vol. V, chap. XII, p. 349). *Glötz*, in "The Greek City" (cited *infra*) at Ch. V, Sect. III, has some valuable comments on the Athenian jury system.
- g.* Trial at Cnidos. From the French translation in *R. Dareste*, *B. Housoulie*, and *Th. Reinach*, "Recueil des Inscriptions Juridiques Grecques", 1st series, p. 159 (Paris, Leroux, 1891).
- h.* Demosthenes' Speech. From the translation in *Kennedy* (cited *supra*), vol. V, p. 187.
- i.* Laws of Gortyna. From the Greek text and French translation in *Dareste*, *H. & R.* (cited *supra*), p. 352.
- j.* Solon's and Timocrates' Laws. From the translation in *Kennedy* (cited *supra*).
- k.* Method of Legislation. From *R. J. Bonner*, "Lawyers and Litigants in Ancient Athens" (1927), p. 98. The text of the law establishing this procedure is quoted in Demosthenes' speech above cited.

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- l.* Land-transfer Record. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 67.
- m.* Lease. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 209.
- n.* Loan. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 313.
- o.* Contract to Drain a Marsh. From the Greek text and French translation in *Dareste, H. & R.* (cited *supra*), p. 145.
- p.* "Even the Greeks . . . produced no true monument of jurisprudence. Law remained in Greece an appendage to rhetoric and ethics" (J. Declareuil, "Rome the Lawgiver", 1926, p. 9). "The key to the (Athenian) popular control of the judiciary was the principle that each panel, being a plenipotentiary committee of the sovereign people, was supreme and independent in its sphere; its authority could not be shared with a chairman or judge or curtailed by any other court. It follows that no body of case-law in equity or authoritative interpretations of statute law or binding precedents could be developed as in the English and American Systems." (R. J. Bonner, "Lawyers and Litigants in Ancient Athens", 1927, p. 74).

The following judgment has been expressed upon the Greek legal literature of a thousand years later, under the successors of Justinian: "The scientific activity of the Greeks devoted itself with the happiest results to the abstractions of theology. But when they took the law for their subject, this direction to their ideas, bent always on speculations, was calamitous for the development of the law. Great as was the superiority of the Greeks in the study and knowledge of the abstract idea of justice, equally inferior were they in the practical application of principles to the concrete circumstances of social life. Admirable as philosophers, they were the reverse as practical jurists. Under the direct influence of Justinian or of the school founded by him, jurisprudence could shine with a passing brilliance in the A. D. 500's. But once left to themselves, the subjects of the Greek empire neglected those studies for which they had neither a calling nor a capacity." (J. A. B. Mortreuil, "Histoire du droit byzantin", Paris, 1843, vol. I, p. 118).

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- ing the whole ground); "The Administration of Justice in the Age of Homer" (Classical Philology, VI, 12); "The Administration of Justice in the Age of Hesiod" (id. VII, 17); "Athenian Arbitrators" (id. XI, 191); "The Legal Setting of Isocrates' Antidosis" (id. XV, 193); "Evidence in the Areopagus" (id. VII, 450); "Evidence in Athenian Courts" (University of Chicago Press, 1905).
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ROMAN  
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## VII

### *The Roman Legal System*

1. Roman instinct for law and order—Territorial expansion.

#### *(I) Period of the Republic*

2. The Twelve Tables—Public inscription of laws—City ordinance for highway regulation, B. C. 45—Colonial city ordinance for court-procedure.
3. Earliest civil judgment, in a boundary suit.
4. Transactional instruments—Contract to build a gateway, B. C. 105—Deed from Dacia—Testament from Egypt.
5. Lay tribunals—The advocate—Tacitus on the status of advocates—Hortensius—Cicero—Essay on argumentation.
6. The court-houses—Jury trials.

#### *(II) Period of the Early Empire*

7. The praetor—Trial methods—Trial of Apollonius at Rome—Sophists' trial at Athens—Trial of Jesus at Jerusalem.
8. Development of a science of law.
9. Julian, the judge—The Perpetual Edict—Records of decisions.
10. Ulpian and Papinian, the counsellors—Opinion rendered by a counsellor—Case-law.
11. Quintilian, the teacher—Treatise on the Education of the Advocate.
12. Gaius, the jurist—The Institutes—Dawn of legal science.

#### *(III) Period of the Later Empire*

13. Justinian at Byzantium—Compilation of the Digest.
14. Italy occupied by the Germanic tribes—Disappearance of Roman Law in the West.



VII. 1—MAP OF THE ROMAN EMPIRE



## VII

# The Roman Legal System



THE earliest Roman settlers, beginning as simple immigrant colonists, were soon driven by their restless domineering energy to enlarge their domain. Gradually, by sheer conquest, their territories extended, during ten centuries, until the boundaries included almost the known world.<sup>1</sup> But amidst their victorious expansion, they carried with them their peculiar racial contribution to civilization, namely, a passion for law and order. By four centuries after their earliest juristic effort (the Twelve Tables), the Roman instinct for constitutional and legal ideas had produced a well-developed system. Their fine arts were devoted to the embellishment of their civic life, and a political career was the ambition of their ruling classes.<sup>2</sup> The Forum was now a teeming brilliant centre of politics and of justice. In that meeting-place were set up, on tablets of enduring bronze, their principal laws. The popular assemblies, which enacted the laws, met at one side of the Forum. The courts were held in the same central area. It was Augustus who perfected the architectural splendor of the

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Forum; and it was his famous dying boast that he found Rome brick but he left it marble.

The system of Roman law can best be sketched in three stages,—the period of the Republic, the period of the early Empire, and the period of the later Empire.

### (I) THE PERIOD OF THE REPUBLIC

2. The earliest formulation of Roman law, known as the Twelve Tables, was a crude code of twelve concise chapters, dating about B. C. 400. The first Table, or chapter, restored in English, will exhibit its style:<sup>a</sup>

[*The Twelve Tables: Cap. I.*] "1. If a man call another to law, he shall go. If he go not, they shall witness it; then he shall be seized.



VII. 2—THE FORUM

## 2. *Legislation*

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“2. If he flee or evade, lay hands on him as he goes.

“3. If illness or age hinder, an ox-team shall be given him, but not a covered carriage, if he, defendant, does not wish.

“4. For a rich citizen the surety shall be a rich one; for a poor one, whoever offers shall be surety.

“5. [Missing.]

“6. Where they settle the matter, let it be told.

“7. If they settle not, they shall join issue in the assembly or in the Forum before midday, then they shall plead and prove, both being present.

“8. After midday, the cause shall be adjudged to the party present if the other has failed to appear.

“9. If both attend, sunset shall be the last moment of the cause.

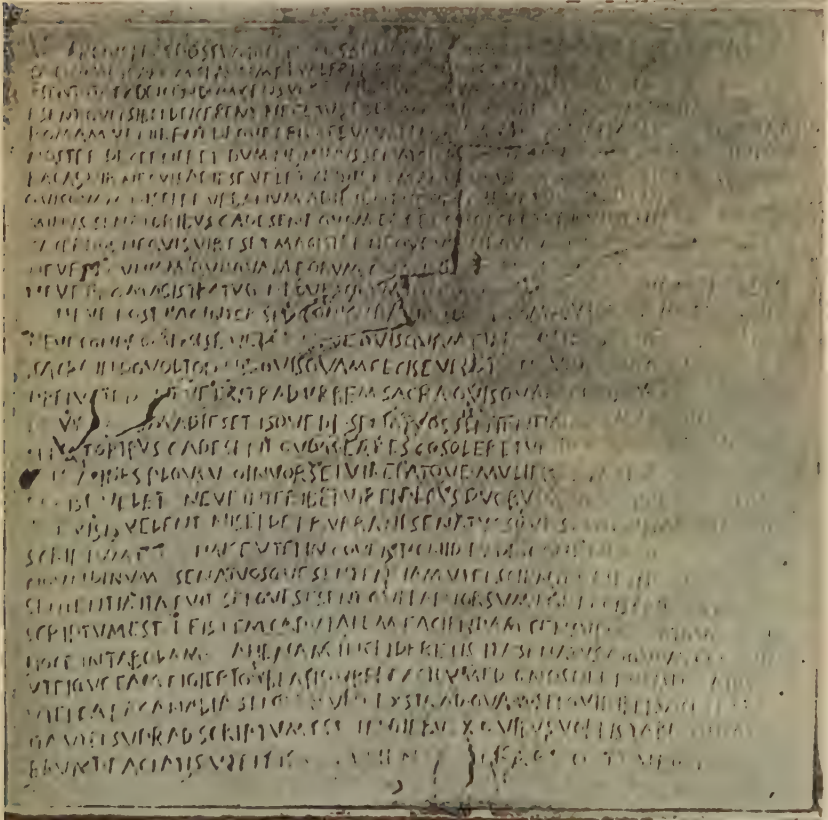
“10. [Missing.]”

This code (it will be observed) was chiefly procedural, —not moral, like the Hebrew Ten Commandments. “If a man call another to law, and he go not, he shall be seized”; and so on. But it was venerated as a classic tradition, and Cicero, four centuries later, wished that every schoolboy should learn its precepts by heart.

The Tables themselves have not been preserved, but we know their probable appearance from other early inscriptions, such as the Senate Resolution of B. C. 186 on the Festivals. Long after the introduction of wax tablets for writing, and of papyrus and parchment rolls for the recording of laws and literature, the Roman practice pre-

## VII. Roman Legal System

ailed of publicly setting up important laws on durable marble or bronze, in the form of pillars or placards, for general perusal.<sup>3</sup> Three thousand bronze plates, the records of such laws, were preserved on the Capitoline



VII. 3—SENATE RESOLUTION DE BACCHANALIBUS, B. C. 186  
One of the earliest inscriptions of Roman law now extant

## 2. *Legislation*

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Hill in a special library. But these have all disappeared. Only a score or more, from other regions of the empire, have been unearthed by the archaeologists.

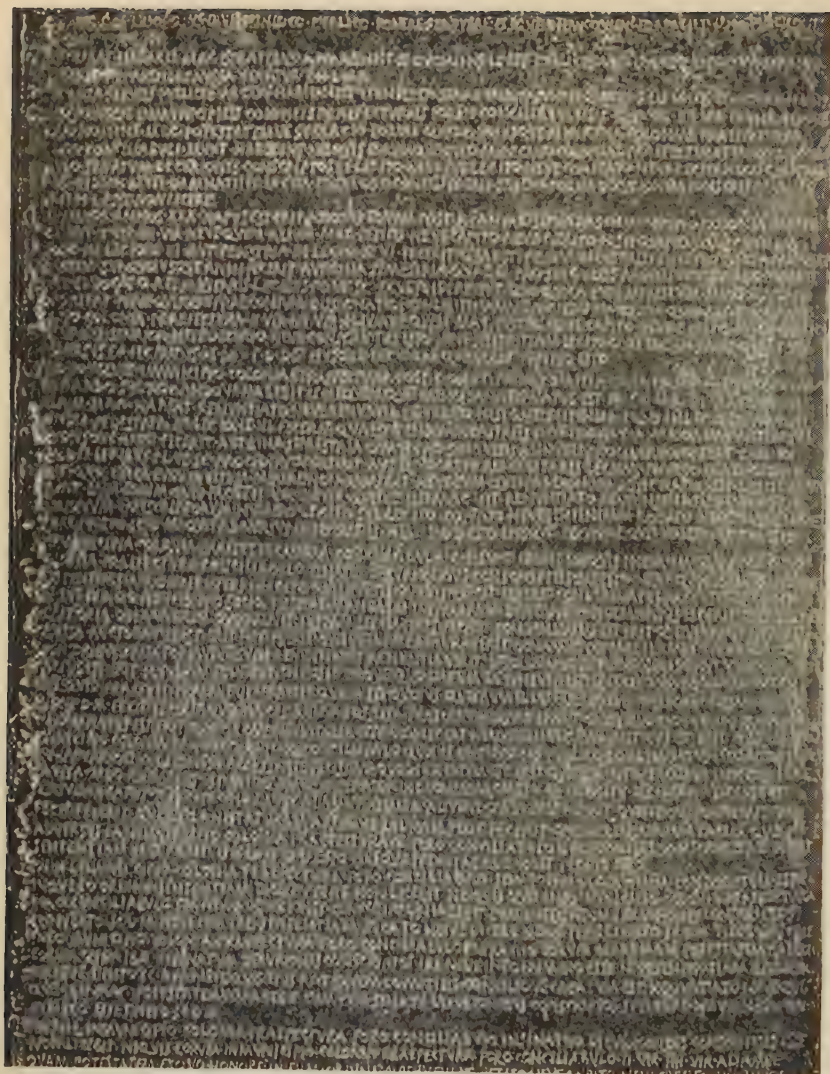
The *Lex Julia Municipalis*<sup>a</sup> is one of the best preserved; it is a fragment of a city code, dating from B. C. 45. Here are some provisions for the care of highways and regulation of traffic; their technique reveals the high order of administrative and legislative method already reached at Rome, and a notable advance over the models of Greek law.<sup>b</sup>

[*Lex Julia Municipalis: Highway Provisions.*] "Every aedile, to whom by this law any part of the city shall be assigned, shall be charged with repairing and maintaining the roads in all places within that part in such manner as this law shall direct.

"Where a road lies or shall lie between a sacred temple or a public building or a public space and a private tenement, it shall be the duty of the aedile in charge of that part of the city in which such sacred temple or public building or public space is situate, to contract for the maintenance of one-half of the said road.

"If any person, required by this law to maintain a public road in front of his tenement, shall fail to maintain such road to the satisfaction of the aedile concerned, then it shall be the duty of the aedile at whose discretion the road ought to be maintained to contract for the maintenance of such road. Furthermore, the said aedile, not less than ten days before he concludes the contract, shall have it publicly notified in the Forum in front of his tribunal, the description of the road to be contracted for, the day fixed for the contract, and the name of the person before whose tenement the road is situate. He shall further cause due notice to be given, to





VII. 4—LEX JULIA MUNICIPALIS B. C. 45  
One tablet of a city code

## 2. *Legislation*

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the said person and to his agents at their respective houses, of his intention to contract for the road and of the day fixed for the contract. The said contract shall be concluded openly in the Forum by means of the urban quaestor or the presiding member of the treasury for the time being. The sum paid to the contractor for the said road, and the proportion of that sum falling on the several persons whose tenements abut on the road, according to the length and breadth of the road in front of their several tenements, the urban quaestor or the presiding member of the treasury for the time being shall cause to be entered in the public accounts of money owing to the people. Such sums he shall to the best of his honest judgment assess among the several parties as due to the person contracting for the maintenance of the said road. If any person so assessed shall, within the next thirty days after he or his agent is notified of the assessment, fail to pay the money or to satisfy the party to whom he is made liable, then such person shall be bound to pay in addition half the same sum to the party to whom he shall be liable, and for such purpose the magistrate to whom application shall be made in the matter shall assign a referee or referees in such manner as a referee or referees would be assigned in an action for money loaned.

“Where the maintenance of a road is by this law to be assigned to a contractor, the aedile responsible for the same shall contract for the maintenance of the said road through the urban quaestor, or the presiding member of the treasury for the time being, in such manner that the road shall be maintained to the satisfaction of the person who shall have had charge of the said contract. The urban quaestor, or the presiding member of the treasury for the time being, shall see that the sum agreed upon for the contract of each road shall, according to the terms of the agreement, be paid to the party contracting for that road or be credited as due to his heir.

“Any person, before whose tenement a footpath shall be situate, shall be required to keep such footpath fitly paved along its whole length where it abuts on the said tenement, with stones whole and

## *VII. Roman Legal System*

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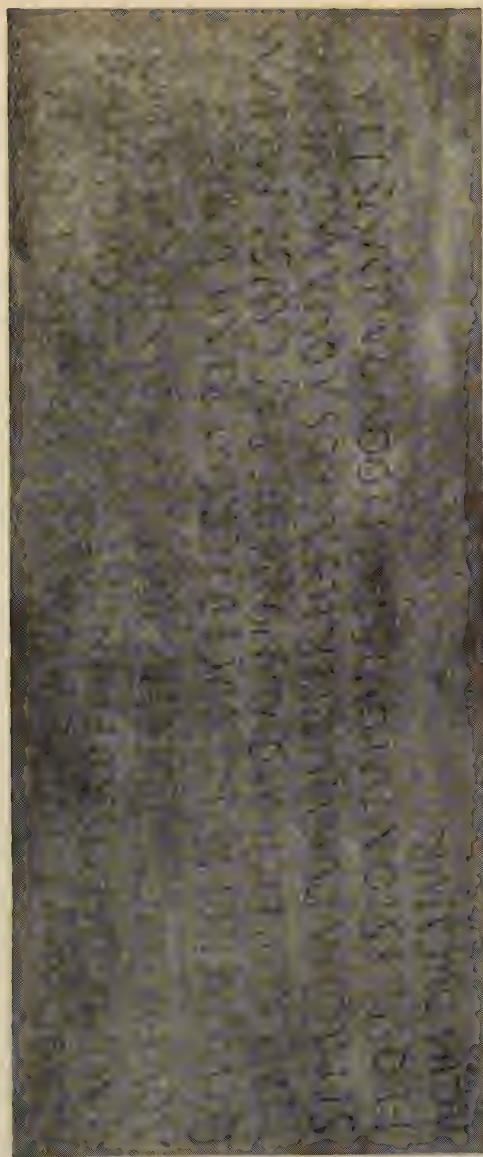
closely compacted, to the satisfaction of the aedile to whom by this law the charge of roads in that part shall appertain.

“In the roads which are or shall be within the city of Rome, or within the limit of continuous habitation, no person, after the first day of January next following, shall be allowed in the daytime, after sunrise or before the tenth hour of the day, to lead or drive any heavy wagon; except where it shall be requisite, for the purpose of building the sacred temples of the immortal gods or executing some public work, to draw or convey material into the city, or where, in pursuance of a contract for the demolition of buildings, it shall be requisite for public purposes to carry material out of the city or away from such places, and in cases and for objects for the which it shall be lawful for specified persons and for specified causes to lead or drive such wagons.

“On all days when the Vestal Virgins, the director of religious ceremonies, and the priests, shall be required to ride in wagons in the city by reason of the public religious ceremonies of the Roman people, or when wagons shall be required for a triumphal procession on the day fixed for such triumph, or for games which shall be publicly celebrated within the city of Rome, or within one mile of the city, or for the procession at the circus sports, for all such causes and on all such days it shall be lawful for wagons to be led or driven in the city in the daytime, anything in this law to the contrary notwithstanding.

“It shall be lawful for wagons, brought into the city by night, drawn by oxen or horses, if returning empty or conveying away refuse, to be in the city of Rome or within one mile of the city after sunrise in the first ten hours of the day, anything in this law to the contrary notwithstanding.”

Another city code, for a colonial city in southern Spain (*Lex Coloniae Genetivae Juliae*), dating about B. C. 45, contained originally some one hundred and fifty sections.<sup>5</sup>



VII. 5—LEX COLONIAE GENETIVAE JULIAE  
A city code, about B. C. 45, for a provincial city in Spain



## VII. Roman Legal System

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The following extracts illustrate, not only the style of legislative draftsmanship, but the determined practice of the Romans in carrying their own system of justice into remote conquered regions:<sup>c</sup>

[*Lex Coloniae Genetivae Juliae: Court Procedure.*] "XCIV. No person in this colony shall adjudicate or have jurisdiction, save the two magistrates, or a deputy left in charge by a magistrate, or an aedile, as provided for in this law. Nor shall any one by virtue of such imperium or power cause any person to adjudicate in the said colony, save those empowered so to do by this law.

"XCV. In the case of referees being assigned and failing to give judgment on the day commanded, the magistrate or deputy shall, when the cause in question comes on, order the said referees and the party concerned in the said cause to be present, fixing a certain day for their appearance, until the said cause shall be adjudicated, and he shall without prejudice cause adjudication in the said cause to be made within twenty days after referees were assigned and ordered to adjudicate. And he shall cause public notice to be served on the witnesses to the said cause, not exceeding twenty persons, being colonists or resident aliens, selected at will by the person who shall conduct the cause. And he shall take measures that the persons on whom such notice is served, and whose names are included in the list of witnesses, shall be present at the said trial. And he shall without prejudice cause any person, who shall know or have heard aught of the matters under inquiry, to declare his evidence, after taking oath, provided that not more than twenty persons in all be compelled to give evidence at any one trial.

"No person shall be compelled to give evidence against his will who is related to the party concerned in the said cause, as father-in-law, son-in-law, step-father, step-son, patron, freedman, cousin, or any nearer connexion by blood or affinity. In the case of the magis-



## 2. *Legislation*

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trate or deputy, who shall make such claim for the colonists, failing to be present, if such absence shall be due to serious illness or to business connected with bail or jurisdiction or a sacrifice or a funeral in his household or purificatory rites ensuing thereon, or if he shall be detained by some magistracy or power conferred by the Roman people, then it is not the intention of this law that in the absence from the court of the person conducting the matter, the allotment or rejection of the referees shall proceed or the matter be adjudicated.

“In the case of a private person making the claim, and failing to be present, on the proper day for the holding of the court, and not having been excused when the case shall come on at the discretion of the magistrate or deputy, on the ground that one of the aforesaid causes of absence had arisen, viz., serious illness or business connected with bail or jurisdiction or a sacrifice or a funeral in his household or purificatory rites ensuing thereon, or that he is prevented from attending by a magistracy or power conferred by the Roman people; then no action shall lie in respect to matters for which an inquiry is provided by this law. And in respect to such matter, the law shall take its course, and the matter remain exactly as though no jurors had been elected and no referees assigned for the said matter. . . . .

“CII. No magistrate, holding an inquiry or conducting a trial in accordance with this law, shall, unless such trial is by this law bound to be concluded in one day, hold the said inquiry or conduct the said trial before the first or after the eleventh hour of the day. The said magistrate shall also, in respect to the several accusers, give to the chief accuser the privilege of making his accusation for four hours, and to every subordinate accuser for two hours. In the case of an accuser conceding a portion of his time to another person, he shall give to the said person, to whom such time is conceded, so much the longer time for speaking. He shall likewise give to the person, who shall have conceded a portion of his time to another, so much the shorter time for speaking. For whatsoever total number

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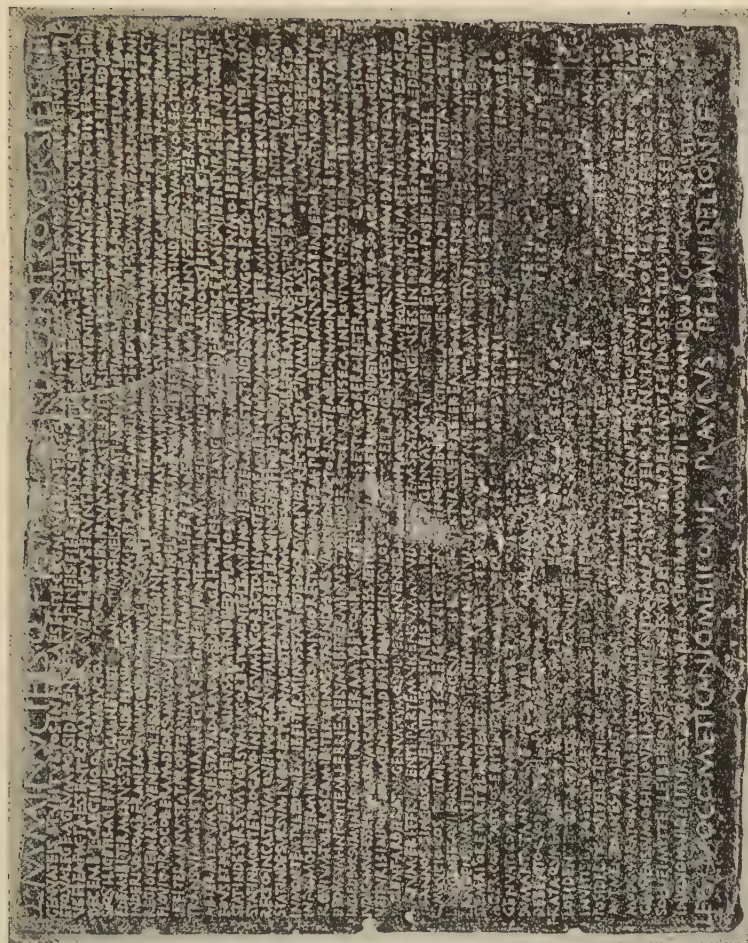
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of hours the whole number of accusers shall have the privilege of speaking in each several proceeding, he shall give to the defendant or the person pleading for the defendant the privilege of speaking for twice the said number of hours in each proceeding."

3. The earliest recorded civil judgment now extant dates from B. C. 117.<sup>6</sup> It occurs on a bronze tablet, found near Genoa, and represents a formal judgment of arbitration between two local tribes contending over the boundaries of their lands. The record describes the boundaries in language quite comparable with the best technical style of New England conveyancers in our own day:<sup>d</sup>

[*Genoa Judgment*, B. C. 117.] [1] "Quintus and Marcus Minutius, sons of Quintus, clan of Rufus, have taken jurisdiction of the issues between the Genoese and the Viturians in the present cause, and in their presence have reached a decision on the issues and have made a finding as to the title to the land and as to its boundaries, and have directed that the bounds be run and that land-marks be set up, and, when this was done, ordered the parties to come to Rome and at Rome in their presence gave judgment, pursuant to a Senate resolution, on the Ides of December, in the consulate of Lucius Cecilius, son of Quintus, and of Quintus Mucius, son of Quintus, as follows:

[2] "The farm-land at Castellus of the Viturii Langenses is the individual property of the Viturians, their heirs and assigns, not subject to tax. It is bounded as follows: At the mouth of the brook which starts from the spring at Manicelo, and at the point where it meets the river Ede, there is a boundary-stone; thence up along the river till it meets the river Lemuri; thence up along the river Lemuri to the brook Cumberanea; thence up along the bank of the



VII. 6—THE JUDGMENT AT GENOA  
This dates from B. C. 117, and is the earliest original record  
extant of a civil judgment in Roman law

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Cumberanea to the Ceptiema Valley; there are here two boundary-stones at the Postumia road; thence on the straight line drawn through these stones to the brook Vendupale; from the brook Vendupale to the river Neviasca; thence down along the river Neviasca till it meets the Procobera; thence down along the Procobera to the point where the brook Vinelasca unites with it; there is here a boundary-stone, at the Postumia road, and another beyond the road; from the boundary-stone beyond the road in a straight line to the spring at Manicelo; thence down along the brook which starts from the spring at Manicelo, to the boundary-stone at the river Ede the point of beginning.

[3] "As to the public land belonging to the Viturians, it is adjudged that the boundaries are as follows: At the point of confluence of the Ede and the Procobera there is a boundary-stone marked I; thence up along the river Ede to the foot of the Lemorino hill, where there is a boundary-stone marked II; thence up to the Lemorino ridge, meeting a boundary-stone at the Procavo hill marked IV; thence up along the ridge to the summit of the Lemorino hill, to where there is a boundary-stone marked V; thence continuing by the ridge to the Castellus known as Alin, where there is a boundary-stone marked VI; thence traveling by the ridge on the Joventius hill to where there is a boundary-stone marked VII; thence following the ridge on the Apennine hill known as Boplus, to where there is a boundary-stone marked VIII; from the Apennine, following the ridge to the Tuledo hill, to where there is a boundary-stone marked IX; thence down the slope along the river Veraglasca to the foot of the Berigiema hill, to a boundary-stone marked X; thence by the slope up to the hill Prenico, to a boundary-stone marked XI; thence by the slope descending to the river Tutelasca, to a boundary-stone marked XII; thence up the slope of Blustimelus to the hill Claxelus, to a boundary-stone marked XIII; thence descending to the spring Lebriemelus, to a boundary-stone marked XIV; thence down along the brook Eniseca to the river Procobera, to a boundary-stone



### 3. *Judicial Records*

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marked XV; thence down along the river Procobera to the point of confluence of the rivers Ede and Procobera at the point of beginning.

[4] "Of the foregoing land, adjudged to be public land, the Viturii of Castellus Langascus shall have the lawful possession and enjoyment. For this land the Viturii Langenses shall pay 400 veiturii annually in rental to the treasury of Genoa. If they shall fail to pay this sum or to satisfy the Genoese in some other manner acceptable to the latter, and provided the Genoese shall not be the cause of the delay, the Langenses shall be bound to deliver each such year to the treasury of Genoa the twentieth part of the grain produced on that land and the sixth part of the wine.

[5] "Whoever whether Genoese or Viturian possesses land within these boundaries shall be confirmed in the possession and enjoyment thereof, provided his possession dates at least from the kalends of the sixth month of the consulate of L. Cecilius Metellus and of Quintus Mucius [B. C. 117], and those persons who have the enjoyment of such possessions shall pay to the Langenses a ratable tax equally with all other Langenses who shall be in the possession and enjoyment of said land. Other than these no person shall hold any part of the said land without the consent of a majority of the Viturii Langenses, provided that none other than Genoese or Viturians shall be allowed as settlers therein. And whoever fails to abide by the decision of the majority of the Viturii Langenses shall not be allowed to remain in possession and enjoyment of said land.

[6] "As to the portion of said land which is common land, it shall be lawful for the Genoese and the Viturians to pasture their herds as in the remaining land of Genoa allotted for public pasture; no one shall impede or resort to force to prevent it, nor shall any one impede from taking wood and materials.

[7] "The first instalment of tax due from the Viturii Langenses shall be paid on the kalends of January of the second year, and for



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those lands which shall have been enjoyed in use prior to the kalends of January they shall not be bound to pay any tax.

[8] "As to meadowland which in the [current] year of the consulate of L. Cecilius and Quintus Mucius shall be ripe for cutting hay, located in the public lands, whether in the possession of the Viturii Langenses, or of the Odiati or the Dectunini or the Cavaturini or the Mentovini, no one shall be allowed to cut hay nor to put animals to pasture therein, nor to make use of it otherwise, without the consent of the Langenses, the Odiati, the Dectunini, the Cavaturini, or the Mentovini, respectively for the tracts possessed by each of them. If the Langenses, the Odiati, the Dectunini, the Cavaturini or the Mentovini, shall wish to establish new meadows in such land, or to close them, or to cut the hay, they shall be at liberty to do this on condition that they make no greater extension of meadowland beyond the area had and enjoyed in the summer last past.

[9] "As to the Viturii who in the dispute with the Genoese were prosecuted and sentenced for assault, if any one of them is still in prison for such offence, it is held that the Genoese shall absolve and set him at liberty. Prior to the ensuing Ides of the sixth month, if on this ground there is any complaint of injustice, let them appear before us on any day not assigned to other cases nor to public functions.

"[Signed]

"[Representative for Genoa] Mocus Meticanus, son of Metico;

"[Representative for Viturii] Plaucus, son of Pelion of Pelius."

This document from Genoa is a report of the local representatives embodying the terms of the arbitrators' judgment. But the records themselves of the courts of this period, showing the forms of entry used—whether of

#### 4. *Conveyancing*

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Senate or Assembly or praetor or special courts—have all disappeared.

4. The records of legal transactions between individuals, in classic times, have virtually all perished. But it is certain that the Romans (profiting of course from their contact with Greek commerce and literature) used well-developed forms of conveyancing. There is extant a city ordinance of B. C. 105,<sup>7</sup> giving specifications for a contract to build a gateway in a wall abutting on a highway in the town of Puteolis, and in this contract are revealed all the expedients of long experience and careful draftsmanship which we moderns are accustomed to expect in such transactions.<sup>8</sup> The specifications are so complete that archaeologists have been able to restore the entire structure in detailed design:<sup>9</sup>

[*Contract to Build a Gateway.*]

[Date.] "In the ninetieth year since the founding of the Colony, under the magistrate Numerius Fufidius, son of Numerius, and Marcus Pullius and the consuls Publius Rutilius and Gnaeus Mallius.

##### Of Public Works, Lex No. 2

[Subject.] "Proclamation for the construction of a wall in the court in front of the temple of Sarapis across the street. Whoever shall be awarded the contract shall furnish bondsmen, secured by real estate, to the satisfaction of the magistrates.

[Specifications.] "In the court across the street, where now stands a wall near the street, in said wall at the middle point, he

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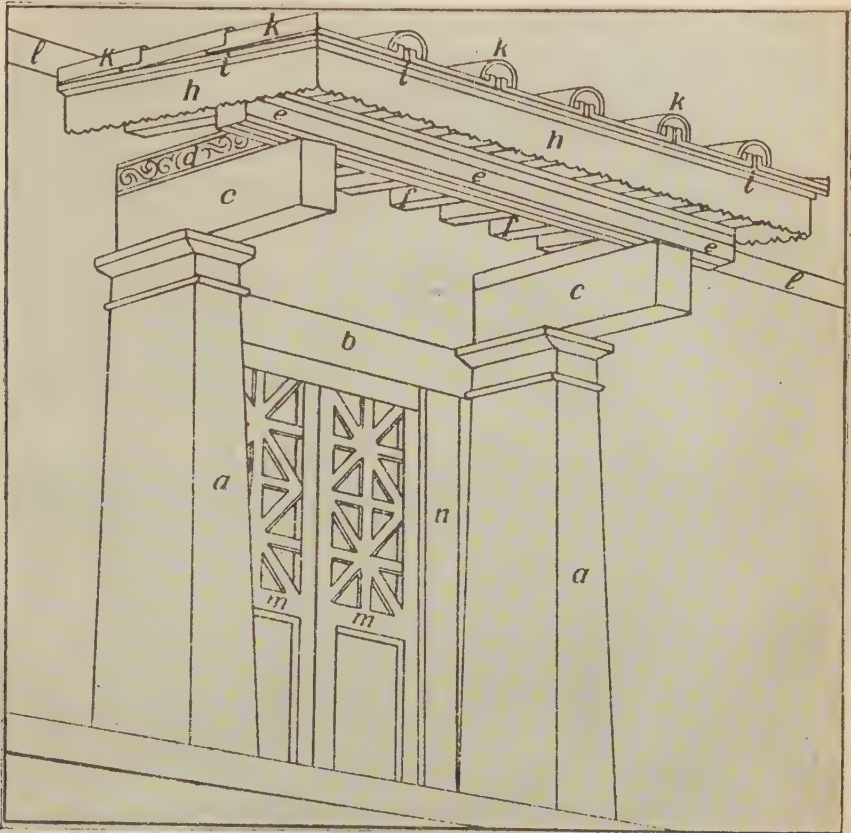
AB COLONIA DEDUCTA ANNO XC  
N F FIDIONE F M P VILIO DVO VIR  
P R V T I L I O C N M A T L I O C O S  
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### VII. 7—CITY CONTRACT FOR BUILDING A GATEWAY

This inscription, "Lex parieti faciendo", contains elaborate specifications for the contractor's undertaking, similar to those of the present day

shall open a gate-way, and shall make this 6 feet wide, and 7 feet high. From said wall on both sides of the gate he shall make two pilasters, and he shall make the two pilasters on the side towards

#### 4. Conveyancing



VII. 7.1—RECONSTRUCTED DESIGN FOR THE GATEWAY,  
DEDUCED FROM THE SPECIFICATIONS

the sea project 2 feet long by  $1\frac{1}{4}$  feet thick. Over said gate he shall place a lintel of oak 8 feet long,  $1\frac{1}{4}$  feet wide, and  $\frac{3}{4}$  feet high. Over this lintel and the pilasters he shall be required to lay two beams of oak 8 inches thick, 1 foot high, and projecting from the outer and the inner side of the wall 4 feet. To this he shall attach

## *VII. Roman Legal System*

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with iron nails a decorated moulding. Over said projecting beams he shall place two small transverse beams of fir, 6 inches square, and shall fasten these with iron nails. He shall thereon lay rafters of cut fir, 4 inches by 4 inches, and said rafters he shall space not farther than 9 inches apart. On the rafters he shall place sheathing of fir, made of foot timber. A facing board of fir, 9 inches by  $\frac{1}{2}$  inch, with ogee moulding, he shall attach, and fasten the same with flat-headed iron nails.

“The said gate-way he shall cover with tile roofing, using six pieces in each row reckoning both sides of the gate, laid in squares. All the border tiles shall be fastened to the facing board with iron nails; and over the upper row of tiles as a ridge piece he shall place the coping of the wall.

“The said contractor shall make two latticed doors, with winter-oak door posts, shall set them up, fit the lock, and finish them with pitch, after the pattern of the doors at the Temple of Honor.

“Likewise the wall which forms the outer boundary of the court away from the street, said wall with its coping he shall make 10 feet high. Likewise the door which now serves as an entrance in the court, and the windows in the same wall opening upon the court, he shall be required to wall up. Furthermore, upon the first wall aforesaid, standing now adjacent to the street, he shall place a continuous coping.

“All these walls and their coping throughout, where not surfaced, he shall dress with a mortar of lime and sand, smoothed down, and then cover with properly prepared white-wash. In the mortar which shall be prepared for the wall, he shall use in three parts of Puteolan earth one part of slaked lime. And in the structure of the wall, he shall neither build in any stone larger than shall by dry measure weigh 15 pounds, nor make the corner stones higher than  $4\frac{1}{2}$  inch.

“The ground he shall clear of all debris after the work.



#### 4. *Conveyancing*

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[The Area Sacra.] “Furthermore, the shrines, altars, and statues which are now in the campus, and which shall be later designated to him, all these he shall remove, carry to the enclosed court, arrange, and set up in such position as shall have been designated according to the judgment of the two mayors.

[Conditions of Approval.] “All the aforesaid work the contractor shall do according to the judgment of the two mayors and of their associates in the council of Puteolis, provided not fewer than twenty of them shall be present when this matter is considered. Whatever as many as twenty of them shall under oath and by majority vote approve, shall stand approved; whatever they shall reject, shall stand rejected.

[Time Limit.] “Time for the completion of the work: The first day of November ensuing.

[Payment.] “Time of payment of money: One half shall be paid down as soon as the bonds secured by real estate shall have been executed: the other half upon the completion and acceptance of the work.

[Signed.] “C. Blossius, son of Quintus, [undertaking the contract for] 1500 sesterces, [and offering] security to that amount.

|                              |               |
|------------------------------|---------------|
| “Q. Fufcius, son of Quintus  | } Guarantors” |
| Cn. Tetteius, son of Quintus |               |
| C. Granius, son of Gaius     |               |
| Ti. Crassicius               |               |

But though the transactional instruments on Italian soil, in classic times, remain in the realm of conjecture only, modern archaeology has discovered some invaluable examples of later practice,—chiefly from the papyri of Egypt, where Roman law for several centuries after Caesar’s conquest was administered by Roman judges in

## VII. Roman Legal System

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the Greek language, and also from discoveries in the Carpathian hills, the region conquered by Trajan.

Here is a simple deed of realty, in Dacia, from A. D. 150:<sup>f</sup>

[*Deed of Sale of Realty, A. D. 150.*] “Andueia Batonis has bought and taken title of the half part of a house, being the right half on the front, situated in Greater Alburnus ward of the town Pirustae, bounded by the houses of Plator Acceptianus and Ingenuus Callistus, for three hundred denarii from Veturius Valens. The aforesaid half part of the house, together with its fences, enclosures, approaches, walls, and windows, being sound and in prime condition, the grantee is to hold lawfully and freely. And if any one shall evict the grantee from the said house or any part thereof so that the said Andueia Batonis or any of his assigns shall suffer in the free and lawful possession and enjoyment thereof, then for so much of such full and free possession as shall be diminished Veturius Valens has promised to pay on sworn demand of Andueia Batonis a ratable compensation. And the price three hundred denarii for the said half part of the house Veturius Valens acknowledges that he has received and holds from Andueia Batonis. And it is further agreed between the parties that Veturius Valens shall pay the taxes due on the said house up to the next assessment.—Done at Greater Alburnus May 6th, in the consulship of Quintillus and Priscus. Attest: L. Vasidius Victor, T. Fl. Felix, M. Lucanus Melior, Plator Carpus, T. Aurelius Priscus, Batonis Anneus; Veturius Valens, grantor.”

And here is a Roman's will of A. D. 189, executed in Greek, in Egypt, but certified in a Latin copy:<sup>g</sup>

[*Will, A. D. 189.*] “Gaius Longinus Castor, a veteran honorably discharged from the praetorian fleet at Misenum, has made his will. I direct that my slave Marcella, being over 30 years of age,

#### 4. *Conveyancing*

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and my slave Cleopatra, being over 30 years of age, be freed, and that each inherit an equal part of my estate . . . . Let all other heirs be disinherited. Let my heirs take possession each of her share when . . . . But if the said Marcella suffer the fate of mortals, then I will that her share of the estate go to Sarapion and Socrates and Longus. Likewise for Cleopatra, I will that her share go to Nilus. Whoever might be my natural heir shall be bound, under penalty, to give, do and perform all the provisions here written in this my will and shall hold the estate in trust for that purpose. My slave Sarapias, daughter of my freedwoman Cleopatra, is to be freed, to whom I give and bequeath five tracts of arable land which I hold in the county of Caranis at the place known as Struthus; likewise, one arable tract and a fourth part of the lowland; likewise a third part of my house and a third part of that house which I bought heretofore from Prapetheutes mother of Thaseutis; likewise a third part of the palm-grove which I own, near the canal known as the old canal. I will that my body shall be prepared and buried with due religious rites at the expense of my heirs. If I shall hereafter have left any writing in my own hand [as a codicil] I hereby declare it to be good and valid. This will was made without fraud. The 'family share' of this will Julius Petronianus has bought for one sestertius, witness Gaius Lucretius Saturnilus.

"Chief witness to this will, Marcus Sempronius Heraclianus.

"The will was made in the county of Caranis, district of Arsinoe, October 18th, consulship of the two Silani, in the 10th year of the Emperor. . . [giving his titles]. If I shall have left other writings in my own hand, I declare them valid.

"Opened [after the testator's death] in the city of Arsinoe in the Forum of Augustus at the office of collector of taxes on estates and privileges on February 22 . . . [dating by reign, etc.]. Other [witnesses'] signatures Gaius Longinus Aquilas (who acknowledged), Julius Volusius, Marcus Antistius Petronianus, Julius Gemellus a veteran.

## *VII. Roman Legal System*

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[Two pages of codicil.] "I Gaius Longinus Castor a veteran honorably discharged from the praetorian fleet at Misenum have made this codicil. Marcus Sempronius Heraclianus my esteemed friend, I make executor on his own recognizance. To my cousin Julius Serenus I give and bequeath four sesterces. I have written this with my own hand on the 7th of February. Signed (as witnesses) by Longinus Aquilas and Valerius Priscus. Signers also Gaius Longinus Aquilas, Julius Philoxenus, Gaius Lucretius Saturnilus, Gaius Longinus Castor, Julius Gemellus a veteran.—Opened and acknowledged on the same day that the will was opened. Gaius Lucius Geminianus, a jurisconsult of Rome. I have made this said copy and declare it to be a correct copy of the original will."

5. This advanced stage of law and practice had of course been developed by a legal profession.

And yet, during the Republic, the Roman people had not essentially gone beyond the stage reached by the Greeks. Justice was not yet sharply distinguished from general politics; nor were the juristic functions of the legal profession fully developed.

The jurisconsult—the thinker and adviser solely upon questions of law—was as yet in an early stage of development. In this period, he was more like the "law-speaker" of the Germanic peoples,—the repository of the sacred ancestral rites and civic traditions. His esoteric knowledge was at the disposal of all who might consult him. He was often an augur or a pontifex. Cicero, for example, when he sought to prepare as an advocate, attached himself first to Quintus Scaevola, the augur, and

## 5. *Legal Profession*

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after his death to the other Scaevola, the pontifex maximus, an even more famous man, to absorb from their utterances the traditions of the law. Gibbon's picture of the early jurisconsult is still worth recalling:<sup>h</sup>

"This occult science of the words and actions of law was the inheritance of the pontiffs and patricians. Like the Chaldaean astrologers, they announced to their clients the days of business and repose . . . . . On the public days of market or assembly the masters of the art were seen walking in the Forum, ready to impart the needful advice to the meanest of their fellow-citizens, from whose votes, on a future occasion, they might solicit a grateful return. As their years and honours increased, they seated themselves at home on a chair or throne, to expect, with patient gravity, the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their door. The duties of social life and the incidents of judicial proceeding were the ordinary subject of these consultations, and the verbal or written opinion of the jurisconsults was framed according to the rules of prudence and law. The youths of their own order and family were permitted to listen; their children enjoyed the benefit of more private lessons; and the Mucian race was long renowned for the hereditary knowledge of the civil law."

It was the orator, or advocate, who was the chief personage in this period,—naturally enough, because the tribunals whose decisions he courted were chiefly popular ones, composed of laymen judging alike on law and facts.

Tradition at Rome looked upon advocacy before the public assemblies as a part of the privilege and duty of the patrician class; they were to use their influence, in legal



## *VII. Roman Legal System*

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or political trouble, on behalf of their numerous clan-followers and friends. The latter were the "clients"; the former the "patrons". Hence the sons of the patricians—like the Norman barons after the Conquest—might choose this career of "patron" (or "orator") as honorably as the military career. And the introduction to the Forum (analogous to the "call to the bar") was a most important epoch of life; the youth donned the "man's toga", proceeded to the Forum with a company of his friends and was there formally introduced, by some distinguished citizen, to the career of an orator. He would then attach himself to some professional teacher of speech, and would also frequent the chambers of some jurisconsult and listen to his opinions.

But the orator's knowledge of law was secondary to his oratorical art. Cicero himself disparaged the importance of the former attainment; "if you put me on my mettle", he said, in the speech for Murena, "busy as I am, I will in three days declare myself a jurisconsult". Of Servius Sulpicius, a contemporary of Cicero's, and second only to Cicero as an advocate, the following anecdote is recorded by Pomponius:<sup>1</sup> Servius, preparing to argue a case, came to ask the law from the famous Scaevola (above-mentioned), but could not quite comprehend Scaevola's answer; he asked him again; was answered

## 5. *Legal Profession*

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again, and still could not understand; whereon Scaevola indignantly censured his effrontery: "It is shameful for a patrician, a man of good family, who argues causes, not to be able to understand the very law that forms his vocation"; and Servius, stung by this reproach, then proceeded to study the law in earnest.

In this Republican period of Rome, then (as in Athens) the orator, or advocate, is the chief and typical figure of the legal profession; there is no sharp line between the advocate and the statesman; the jurisconsult is in the background, and the advocate receives the highest public honor.

The outstanding eminence of the advocate in Roman life, and the pleasures of a successful ambition in that field, were feelingly described by Tacitus, who had himself known success at the bar: in his "Dialogue on Orators", the speaker is Marcus Afer, an eloquent Gaul, a distinguished leader of the bar:<sup>j</sup>

[*Tacitus, on the Status of Advocates.*] "What greater gratification can there be for a free-born gentleman, fashioned by nature for lofty pleasures, than to see his house filled to the door every day with a company of persons of the highest rank, and to know that he owes this compliment not to his wealth, not to his childless condition, not to the fact that he holds some office or other, but to himself? Why, people who have no one to leave their money to, and the rich and the great, are always coming, young and poor though he may be, to get him to take up their own cases or those of their friends. Can

## *VII. Roman Legal System*

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vast wealth or great power bring with it any satisfaction comparable to the sight of grave and reverend seniors, men with the whole world at their feet, freely owning that, though in circumstances of the utmost affluence, they lack the greatest gift of all? Just look, again, at the imposing retinue of clients that follows you when you leave your house! What a brave show you make out-of-doors! What an amount of deference is paid to you in the law courts! . . . . . Are there any whose names are dinned at an earlier age by parents into their children's ears? Are there any to whom the plain man in the street, our citizens in their working-clothes, more frequently point as they pass by, saying, 'There goes So-and-So'? Visitors also and non-residents, as soon as they set foot in the capital, ask for the men of whom in their country-towns and colonies they have already heard so much, and are all agog to make them out. . . . .

"Let me make this avowal about my own case. The day on which I was invested with the robe of a senator, or that on which I was elected quaestor, or tribune, or praetor, though a man of new birth and a native of a community which is not at all popular at Rome,—such days have been in no greater degree red-letter days for me than those on which I enjoy the opportunity, to the modest extent of my poor ability as a speaker, of securing an acquittal in a criminal trial, or of pleading some case successfully before the centumviral court, or of undertaking the defence of some redoubtable freedman or imperial agent in the emperor's presence-chamber. Then it is that I feel I am rising above the level of a tribune, a praetor, or even a consul, and that I possess an asset which, unless it comes unbidden, cannot either be conferred by letters-patent or follow in the train of popular favour.

"Why, where is there a profession whose name and fame are to be compared with renown in oratory? What class of men enjoys greater prestige here in Rome?"



VII. 8—HORTENSIUS THE ADVOCATE

It is said that he never used notes for his own speeches, nor  
took notes of his adversary's

## *VII. Roman Legal System*

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The names of these famous advocates begin to be noted as far back as B. C. 200. In the last century of the Republic the esteemed Roman model of his day was Hortensius.<sup>8</sup> He pleaded his first cause at the age of nineteen; and his natural aptitude for his art was so great that he is said never to have had to take notes of his opponent's speech nor to use notes for his own.

But the name of Cicero<sup>9</sup> comes down to us, for his classical style, as the typical Roman advocate for all time. His range of learning in philosophy, in logic, and in political science, has through him enhanced the dignity of the entire legal profession. His speeches against the traitor Catiline, in the Senate, "*Quousque tandem abutere, Catilina, patientia nostra? O tempora! O mores!*" have been read by millions of youths in successive ages;<sup>10</sup> and he is one of the two or three personages of legal literature whose works have become and remained school books in all countries and epochs.

As an illustration of Cicero's methods, let us take, not a speech (for his speeches cannot be judged by short extracts), but one of his essays on the art of speech. The following passage, from his essay on Topics (i. e. materials for argumentation), illustrates how thoroughly he had worked out his logic in its application to the everyday





VII. 9—CICERO

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## VII. Roman Legal System

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materials of litigious debate; for he was fond of saying that no one could be a good advocate without logic.<sup>k</sup>

[*Cicero's Essay on Argumentation.*] "When we wish to examine any argument, we ought to know the Topics,—for so they are called by Aristotle, being, as it were, sources from which arguments are derived. Therefore we may give as a definition, that a Topic is the source of an argument, and that an argument is a reason which causes men to believe a thing which would otherwise be doubtful  
. . . . .

"Arguments are also derived from things which bear some kind of relation to that which is the object of discussion. But this kind is distributed under many heads; for we call some connected with one another either by nature, or by their form, or by their resemblance to one another, or by their differences, or by their contrariety to one another, or by adjuncts, or by their antecedents, or by their consequents, or by what is opposed to each of them, or by causes, or by effects, or by a comparison with what is greater, or equal, or less . . . . .

"An argument is derived from the species, which we may sometimes name, in order that it may be more clearly understood; in this manner: 'If the money was bequeathed to Fabia by her husband, on the supposition that she was the mother of his family; then, if she was not his wife, nothing is due to her.' For the wife is the genus: there are two kinds of wife; one being those mothers of a family who become wives by coemption; the other kind are those which are only considered wives: and as Fabia was one of those last, it appears that nothing was bequeathed to her.

"An argument is derived from similarity in this way: 'If those houses have fallen down, or got into disrepair, a life-interest in which is bequeathed to someone, the heir is not bound to restore or to repair them, any more than he is bound to replace a slave, if a slave, a life-interest in whom has been bequeathed to someone, has died.'





VII. 10—CICERO'S SPEECH AGAINST CATILINE IN THE SENATE  
This painting now decorates the wall of the modern Senate House at Rome

## 5. *Legal Profession*

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“An argument is derived from difference thus: ‘It does not follow, if a man has bequeathed to his wife all the money which belonged to him, that therefore he bequeathed all which was down in his books as due to him; for there is a great difference whether the money is laid up in his strong box, or set down as due in his accounts.’

“An argument is derived from contraries thus: ‘That woman to whom her husband has left a life-interest in all his property, has no right, if his cellars of wine and oil are left full, to think that they belong to her; for the use of them is what has been bequeathed to her, and not the misuse: and they are contrary to one another.’

“An argument is derived from adjuncts thus: ‘If a woman has made a will who has never given up her liberty by marriage, it does not appear that possession ought to be given by the edict of the praetor to the legatee under that will; for it is added that in that case possession would seem proper to be given by that same edict under the wills of slaves, or exiles, or infants.’

“Arguments are derived from antecedents, and consequents, and contradictories, in this way: From antecedents: ‘If a divorce has been caused by the fault of the husband, although the woman has demanded it still she is not bound to leave any of her dowry for her children.’

“From consequents: ‘If a woman, having married a man with whom she had no right of intermarriage, has demanded a divorce, since the children who have been born do not follow their father, the father has no right to keep back any portion of the woman’s dowry.’

“From contradictories: ‘If the head of a family has left to his wife in reversion after his son the life-interest in the female slaves, and has made no mention of any other reversionary heir, if the son dies, the woman shall not lose her life-interest. For that which has once been given to any one by will cannot be taken away from the legatee to whom it has been given without his consent; for it is a



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contradiction for any one to have a right to receive a thing, and yet to be forced to give it up against his will.'

"An argument is derived from efficient causes, in this way: 'All men have a right to add to a common party wall a wall extending its whole length, either solid or on arches; but if any one in demolishing the common wall should promise to pay for any damages which may arise from his action, he will not be bound to pay for any damage sustained or caused by such arches: for the damage has been done, not by the party which demolished the common wall, but in consequence of some fault in the work, which was built in such a manner as to be unable to support itself.'

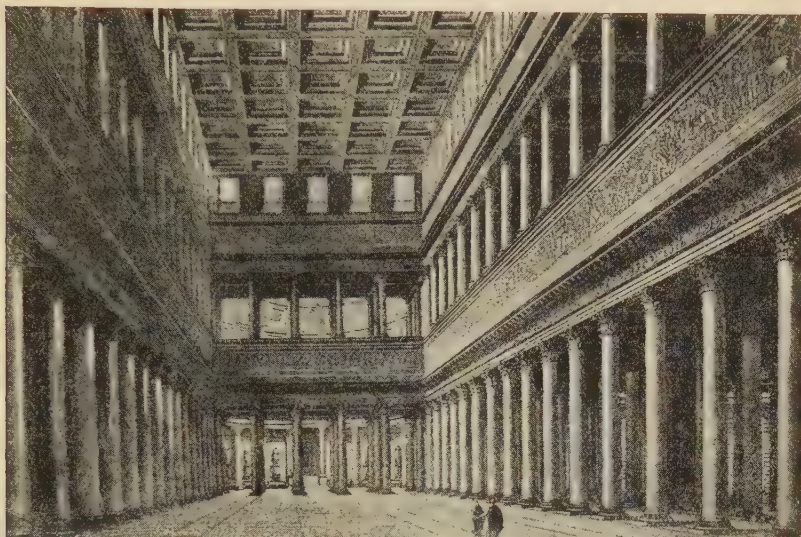
"An argument is derived from what has been done, in this way: 'When a woman becomes the wife of a man, everything which has belonged to the woman now becomes the property of the husband under the name of dowry.' . . . . .

"By these Topics, then, which have been explained, a means of discovering and proving every sort of argument is supplied, as if they were elements of argument."

6. A court of justice at Rome was termed *Basilica*,—oddly enough, from a Greek word of royalty. These spacious edifices had become a prominent feature of Rome's city architecture.<sup>11</sup> Four of these court-houses,—the Julian, the Emilian, the Domitian, and the Constantine *Basilicas*—were in or near the main Forum, close by the meeting-place of the electoral assembly. They were the first secular buildings devoted to justice in any legal system. The courts were so thronged with judicial business that twenty were erected successively within five centuries, in the capital city alone; and remnants of other

## 6. *Court-Houses*

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VII. 11—THE ULPIAN COURT-HOUSE

Twenty of these court-houses, in all, were erected in Rome

Roman court-houses can still be seen in any country of Europe, Asia, or Africa where Roman government reached. Important criminal or political trials might be held in the Forum, in the open air; and at the trial of Milo (made famous by Cicero), which involved great factional feeling, an immense multitude, guarded by soldiers, packed the Forum, and vast numbers crowded roofs and windows in every adjacent spot, to follow the proceedings.

There were various tribunals at Rome. In the early days of the Republic the entire popular assembly might sit in judgment (and there came to be sixty thousand

## *VII. Roman Legal System*

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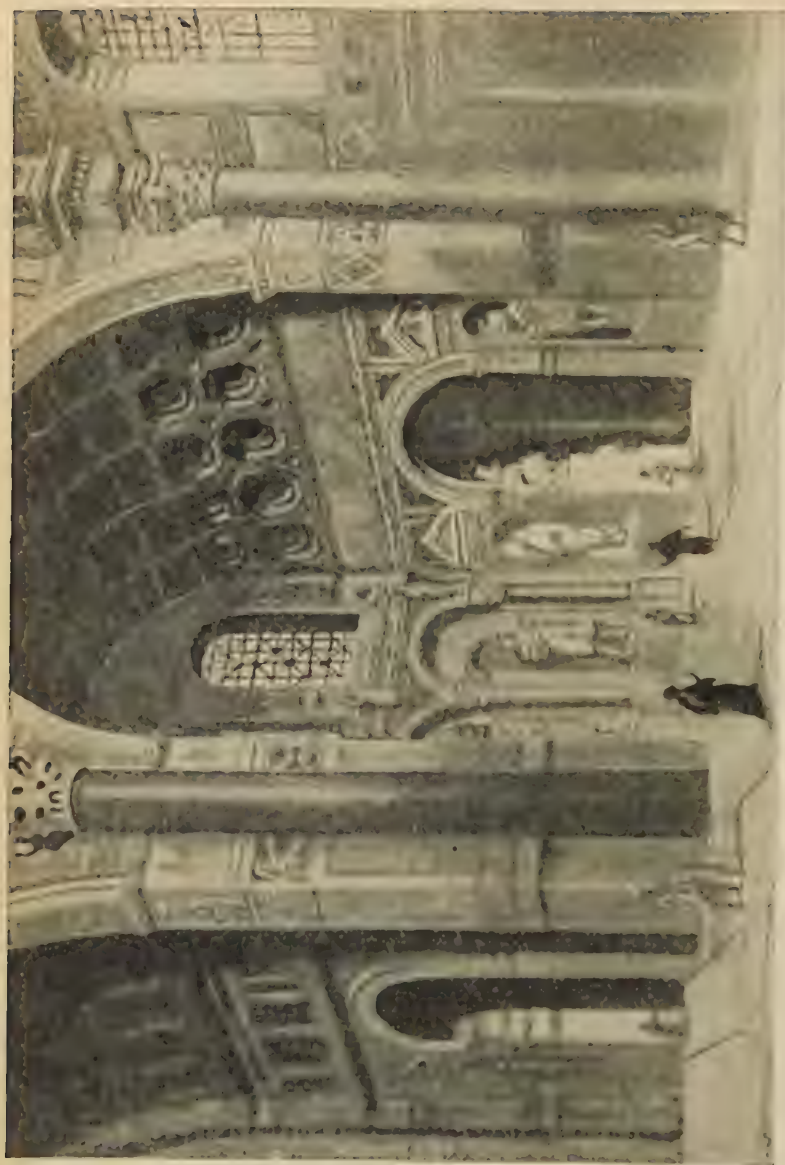
qualified to vote). But, as at Athens, this purely democratic mingling of politics and justice became impracticable, and various smaller bodies were organized for the decision of different classes of cases. Sometimes—for what we should call impeachment cases—that body was the Senate or other General Assembly; sometimes a large special jury selected from a general panel (in the trial of Milo, fifty-one jurors voted); sometimes a smaller body of assessors or referees, assisting the praetor, who received the pleadings,—and this usually in what we should call ordinary civil suits.

It cannot be gainsaid that in the Republican period the dominant spirit had not progressed far beyond that of Greek justice. These lay-courts were judges both of law and fact; there was little judicial direction of law, and no appeal of law. The tribunal was final, in its mingling of law and fact, justice and clemency, logic and popular emotion.

### (II) THE PERIOD OF THE EARLY EMPIRE

7. This method of uncontrolled popular justice would hardly have developed a science of law, any more than it did in Greece. But, as this period closes, the professional judge and jurist come to the front, and the jury-advocate ceases to be the typical figure.





VII. 12—CONSTANTINE COURT-HOUSE

The practor sat in his chair at the apse, and the throng of lawyers, witnesses, clients, and attendants gathered in front of him



## 7. *Trial Methods*

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Under the emperors, lay juries disappeared; and most trials, both civil and criminal, took place under a single judge. As a trial judge, the praetor united in himself all the powers that we distribute between civil and criminal tribunals, common law and equity courts. The praetor, who was of senatorial rank, sat in his chair at the apse or chancel of the basilica; and the throng of lawyers, clients, witnesses and bailiffs, gathered in front of him, standing, as in old Westminster Hall in England.<sup>12</sup>

No eye-witness record of a praetorian criminal trial at Rome has come down to us. But the emperor in person frequently heard and decided causes, especially important criminal charges; and we possess a lively sketch, by Philostratus, of the trial of the philosopher Apollonius, about A. D. 90, before the emperor Domitian. Apollonius was a strange character, a combination of Socrates, Diogenes, and St. Francis; claiming certain supernatural powers, and traveling all over the Roman world. When the vicious and cruel Domitian was at the height of his tyrannous rule, and was in special fear of a conspiracy against his life by Nerva (his successor), some sycophant laid an information for sedition against Apollonius, as being a friend of Nerva, and the emperor ordered his arrest. The principal charge was that he had killed and eaten a boy, as a sacrifice to

## VII. Roman Legal System

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enable him to prophecy success to Nerva. The charge was preposterous; but Domitian's ruthless credulity was known, and Apollonius' friends advised him to remain hidden in Greece. But Apollonius, conscious of rectitude, journeyed straightway to Rome and surrendered himself. After a long sojourn in prison, he was brought to trial before the emperor. During his trial he conducted himself with the same daring nonchalance that is recorded of Socrates; although he had been fully warned that the emperor was determined to put him to death, and was "merely going through the form of a trial to preserve a semblance of justice":<sup>1</sup>

[*Apollonius' Trial.*] "Let us now repair to the law-court to listen to the sage pleading his cause; for it is already sunrise and the doors are thrown open to admit the celebrities. And the companions of the emperor say that he had taken no food that day, because, I imagine, he was so absorbed in examining the documents of the case. For they say he was holding in his hands a roll of writing of some sort, sometimes reading it with anger, and sometimes more calmly. And we must needs figure him as one who was angry with the law for having invented such things as courts of justice.

"But Apollonius, as we meet him in this conjuncture, seemed to regard the trial as a dialectical discussion, rather than as a race to be run for his life; and this we may infer from the way he behaved before he entered the court. For on his way thither he asked the clerk who was conducting him, where they were going; and when the latter answered that he was leading him to the court, he said: 'Whom am I going to plead against?' 'Why,' said the other, 'against your accuser, of course, and the emperor will be judge.' 'And,' said

## 7. *Trial Methods*

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Apollonius, 'who is going to be judge between myself and the emperor? For I shall prove that he is wronging philosophy.' 'And what concern,' said the other, 'has the emperor for philosophy, even if he does happen to do her wrong?' 'Nay, but philosophy,' said Apollonius, 'is much concerned about the emperor, that he should govern as he should.' The clerk commended this sentiment, for indeed he was already favourably disposed to Apollonius, as he proved from the very beginning. 'And how long will your pleading last by the water-clock's reckoning? For I must know this before the trial begins.' 'If,' said Apollonius, 'I am allowed to plead as long as the necessities of the suit require me to, the whole of the Tiber might run through the meter before I should have done; but if I am only to answer all the questions put to me, then it depends on the cross-examiner how long I shall be making my answers.' . . . .

"This was how he prepared himself to confront the despot's manoeuvres; and as he waited before the court another clerk came up and said: 'Man of Tyana, you must enter the court without your cloak.' 'Are we then to take a bath,' said Apollonius, 'or to plead?' 'The rule,' said the other, 'is not to regulate the style of dress, but the emperor aims to prohibit your bringing here either amulet, or book, or any papers of any kind.' 'And not even a cane,' said Apollonius, 'for the back of the idiots who gave him such advice as this?' Whereat the accusing witness (who stood by) burst into shouts: 'O my emperor,' he said, 'this wizard threatens to beat me, for it was I who gave you this advice.'

". . . Such were the preliminary skirmishes which preceded the trial. But the conduct of the trial itself was as follows: The court was fitted up as if for an audience listening to a panegyrical discourse; and all the illustrious men of the city were present at the trial, because the emperor was intent upon proving, before as many people as possible, that Apollonius was an accomplice of Nerva and his friends. Apollonius, however, ignored the emperor's presence so completely as not even to glance at him; and when the accuser up-

## *VII. Roman Legal System*

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braided him for want of respect, and bade him turn his eyes upon the god of all mankind, Apollonius raised his eyes to the ceiling, by way of giving a hint that he was looking up to Zeus, and that he regarded the recipient of such profane flattery as worse than he who administered it. Whereupon the accuser began to bellow and spoke somewhat as follows: 'Tis time, my sovereign, to apportion the clock-water, for if you allow him to talk as long as he chooses, he will choke us. Moreover I have a roll here which contains the heads of the charges against him, and to these he must answer, so let him defend himself against them one by one.'

"The emperor approved this plan of procedure and ordered Apollonius to make his defence according to the accuser's demand; however, he ignored some of the charges as not worth discussion, and confined himself to four questions which he thought were embarrassing and difficult to answer. 'What induces you,' he said, 'Apollonius, to dress yourself differently from everybody else, and to wear this peculiar and singular garb [i. e. linen only, not wool]?' 'Because,' said Apollonius, 'the earth which feeds me also clothes me, and I do not like to bother the poor animals.' The emperor next asked the question: 'Why is it that men call you a god?' 'Because,' answered Apollonius, 'every man that is thought to be good, is honoured by the title of god.' (I have shown in my narrative of India how this tenet passed into our hero's philosophy.) The third question related to the plague in Ephesus; 'What motivated,' he said, 'or suggested your prediction to the Ephesians that they would suffer from a plague?' 'I used,' he said, 'O my sovereign, a lighter diet than others, and so I was the first to be sensible of the danger; and if you like, I will enumerate the causes of pestilences.' But the emperor, fearful, I imagine, lest Apollonius should reckon among the causes of such epidemics his own wrong-doing, and his incestuous marriage, and his other misdemeanors, replied: 'Oh, no, I don't care to hear about that.'

## 7. *Trial Methods*

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“And when he came to the fourth question, which related to [aiding the conspiracy of] Nerva and his friends, instead of hurrying straight on to it, he allowed a certain interval to elapse; and after long reflection, and with the air of one who felt dizzy, he put his question in a way which surprised them all; for they expected him to throw off all disguise and blurt out the names of the persons in question without any reserve, complaining loudly and bitterly of the sacrifice [of the boy by Apollonius]; but instead of putting the question in this way, he beat about the bush, and said: ‘Tell me, you went out of your house on a certain day, and you travelled into the country, and you sacrificed the boy—I would like to know for whom?’”

[At this point Apollonius was ready with a complete defence, in a prepared written speech, which however he did not deliver, choosing rather the daring alternative of demanding proof by the informer. The passage which he was ready to deliver on this part of the charge was as follows:]

“‘What then, O sycophant, was I really doing on that night? . . . . Here is my answer: Philiscus of Melos, who was my fellow-pupil in philosophy for four years, was ill at the time; and I was sleeping out at his house, because he was suffering so terribly that he died of his disease. Ah, many are the charms I would have prayed to obtain, if they could have saved his life . . . . Those are the facts, my prince, which you may learn also from Telesinus the consul; for he too was at the bedside of the man of Melos, and nursed him by night like myself. But if you do not believe Telesinus, because he is of the number of philosophers, I call upon the physicians to bear me witness, and they were the following: Seleucus of Cyzicus and Stratocles of Sidon. Ask them whether I tell the truth. And what is more, they had with them over thirty of their disciples, who are ready, I believe, to witness to the same fact; for if I were to summon hither the relatives of Philiscus, you might probably think that I was trying to interpose



## VII. Roman Legal System

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delays in the case; for they have lately sailed from Rome to the Melian country in order to pay their last sad respects to the dead. Come forward, O ye witnesses, for you have been expressly summoned to give your testimony upon this point.' [The witnesses were to give their evidence. Apollonius continues:] 'With how little regard then for the truth this accusation has been drawn up, is clearly proved by the testimony of these gentlemen; for it appears that I spent that night not in the suburbs, but in the city; not outside the wall, but inside a house; not with Nerva, but with Philiscus; not slaying another, but praying for a man's life; not thinking of matters of state, but of philosophy; not choosing a revolutionist to supplant yourself, but trying to save a man like myself. What then is that informer doing in this case? What becomes of the absurd stories of victims slain? How dare he ask you to believe such lies? For what never took place will be real, if you decide that it did take place.'"

[Instead of the foregoing speech, however, Apollonius answered as follows:]

"And Apollonius as if he were rebuking a child replied to the emperor: 'You are cleverly assuming the very fact charged; for *if* I did leave my house, I could indeed have been in the country; and *if* I was there, then I could have offered the sacrifice: and *if* I offered it, then I could have ate of it. But let these assertions be proved by trustworthy witnesses.' Such a reply on the part of the sage aroused louder applause than beseemed the court of an emperor; and the latter, deeming the audience to have borne witness in favour of the accused, and also not a little impressed himself by the answers he had received, for they were both firm and sensible, said: 'I acquit you of the charges; but you must remain here until we have had a private interview.' Thereat Apollonius was much encouraged and said: 'I thank you indeed, my sovereign; for I would fain tell you how by reason of these miscreants like this informer here your cities are in ruin, and the islands full of exiles, and the mainland of

## 7. *Trial Methods*

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lamentations, and your armies of cowardice, and the senate of suspicion. Accord me then, if you will, opportunity to speak; but if not, then send someone to take my body, for my soul you cannot take. Nay, you cannot take even my body.

“‘For thou shalt not slay me, since I tell thee I am not mortal.’

“And with these words he vanished from the court; which was the best thing he could do under the circumstances, for the emperor clearly intended not to question him sincerely about the case, but about all sorts of irrelevant matters. For he took great credit to himself for not having put Apollonius to death.”

In every provincial city, from Britain to Palestine, the Roman praetor—subject only to the emperor’s rescripts—dispensed justice according to Roman law. A trial-scene in Athens, under the Roman proconsul, about A. D. 330, is preserved for us in a pen-picture by the biographer of Julian, one of the leading sophist-philosophers who then dominated the intellectual world. The sophists, at that period, were held in highest public honor, occupied official professorships, received enormous emoluments (a lecture fee of 250,000 drachmae, or \$50,000, is recorded), and possessed large schools or factions of followers, who jealously maintained the honor of their rival leaders. Two of these schools at Athens—one led by Julian, the other by Apsines the Spartan—had come to blows; hence the trial, as described by Julian’s biographer:<sup>m</sup>

[*Trial of the Sophists.*] “I must set down and introduce into this narrative the following sample of the man’s all-round ability and judgment. It so happened that the boldest of the pupils of Apsines

## *VII. Roman Legal System*

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had, in a fierce encounter, got the upper hand of Julian's pupils in the course of the war of factions that they kept up. After laying violent hands on them in Spartan fashion, though the victims of their ill-treatment had been in danger of their lives, they prosecuted them, as though the Apsinians themselves were the injured parties. The case was appealed to the proconsul, who, showing himself stern and implacable, ordered that the defendants' teacher also be arrested, and that all the defendants be brought in chains, like men imprisoned on a charge of murder. It seems, however, that, for a Roman, he was not uneducated or bred in a boorish and illiberal fashion. Accordingly Julian was in court, as he had been ordered, and Apsines was there also, not in obedience to orders but to help the case of the plaintiffs. Now all was ready for the hearing of the case, and the plaintiffs were permitted to enter. The leader of the disorderly Spartan faction was one Themistocles, an Athenian, who was in fact responsible for all the trouble, for he was a rash and headstrong youth and a disgrace to his famous name. The proconsul at once glared fiercely at Apsines, and said: 'Who told you to come here?' He replied that he had come because he was anxious about his boys. The magistrate concealed his real opinion and said no more; and then the prisoners who had been so unfairly treated came again before the court, and with them their teacher. Their hair was uncut and they were in great physical affliction, so that even to the judge they were a pitiful sight. Then the plaintiffs were told to speak, and Apsines began to make the speech; but the proconsul interrupted him and said: 'This is not the procedure approved by the Romans. He who delivered the speech for the prosecution at the first hearing must try his luck at the second also.' There was then no time for preparation, because of the suddenness of this ruling. Themistocles had made the speech for the prosecution before, but now on being compelled to speak he changed colour, bit his lips in great embarrassment, looked furtively towards his comrades, and consulted them in whispers as to what they had better do. For they had come into court prepared only to shout and

## 7. *Trial Methods*

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applaud vociferously their teacher's speech in their behalf. Therefore profound silence and confusion reigned,—a general silence in the court and confusion in the ranks of the accusers. Then Julian humbly interposed: 'At least give me leave to speak.' Whereupon the proconsul exclaimed: 'No, not one of you shall plead, you teachers who have come with your speeches prepared, nor shall any one of your pupils applaud the speaker; but you shall learn forthwith how strict and complete is the justice that the Romans dispense. First let Themistocles go on with his speech for the prosecution, and then he whom you think best fitted shall speak in defence.' But no one spoke up for the plaintiffs, and Themistocles' failure was a scandal and a disgrace to his great name.

"And then, when the proconsul ordered that any one who could should reply to the original speech of the prosecution (at the first hearing) Julian the sophist said: 'Proconsul, in your superlative justice you have transformed Apsines into a Pythagoras, in that tardily but very properly he has learned how to preserve silence; for Pythagoras long ago (as you are well aware) taught his pupils silence. But, if you will allow one of my pupils to make our defence, give orders for Prohaeresius to be released from his bonds, and you shall judge for yourself whether I have taught him the Attic manner or the Pythagorean.' The proconsul granted this request very graciously (as Tuscianus, who was present at the trial, reported to the author), and Prohaeresius came forward from the ranks of the defendants without his fetters, before them all, after his master had called out to him (not in a loud and piercing voice, such as is used by those who exhort and incite athletes contending for a garland, but still in penetrating accents): 'Speak, Prohaeresius! Now is the time to make a speech!' He then first delivered a proöemium of some sort (Tuscianus could not exactly recall it, though he told me its purport). It launched out, and soon slid into a pitiable account of their sufferings, and he inserted an encomium of their teacher. In this proöemium he let fall only one allusion to a grievance, when

## VII. Roman Legal System

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he pointed out how headlong the proconsular authority had been, since even had there been proof of their guilt it was not decent for them to be subjected to such indignities. At this the proconsul bowed his head, and was overcome with admiration of the force of his arguments, his weighty style, his facility and sonorous eloquence. Meanwhile, they all longed to applaud, but sat cowering as though forbidden to do so by a sign from heaven, and a mystic silence pervaded the place. Then he lengthened his speech into a second proöemium as follows (for this part Tuscianus remembered): 'If, then, men may with impunity commit any injustice and bring accusations and win belief for what they say, before the defence is even heard, so be it! Let our city be enslaved to Themistocles!'

"Then up jumped the proconsul, and shaking his purple-edged cloak (the Romans call it a 'tebennos'), that austere and inexorable judge applauded Prohaeresius like a schoolboy. Even Apsines joined in the applause, not of his own free will, but by sheer force of necessity. Julian his teacher could only weep with joy. The proconsul ordered all the accused, but of the accusers their teacher only, to withdraw, and then taking aside Themistocles and his Spartans, he gave them a practical example of the floggings of Lacedaemon, and added besides the kind of flogging in vogue at Athens."

The most momentous trial in Roman history took place in the Praetorium at Jerusalem.<sup>13</sup> "And they began to accuse Him, saying, We found this man perverting our nation." And Pilate at first sent Him to Herod, the Hebrew king; but Herod sent Him back to Pilate; for though the Hebrew people still lived according to their own laws, the Roman praetor alone could give a judgment of death (*ante*, Chap. III). So Pilate—the example, for





VII 13—JESUS ARRAIGNED BEFORE PILATE



## 8. *Legal Science Develops*

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all time, of the cowardly judge—went out and addressed the multitude and asked them, “What shall I do unto Jesus?” And they shouted, “Crucify Him, Crucify Him”. And Pilate gave judgment as the mob wished, and he scourged Jesus and delivered Him to be crucified. And the soldiers led Him away in the court of the Praetorium.

8. It was under Augustus that the Roman legal system decisively stepped forward into its characteristic phase.

Under Augustus, the judges and the referees of facts in civil cases were for the first time obliged to follow the written opinions of official jurisconsults; and this fostered a consistent and logical development of fixed principles. Formerly (Pomponius tells us)<sup>n</sup> there had been no official opinions, “but any persons who were reputed for their learning gave opinions when consulted; nor did they give formal authenticated opinions, but either they themselves wrote something for the jurors or the clients reported what they had said. But the Emperor Augustus, so that the law should be held in greater respect and authority, ordained that certain opinions should carry the force of his own authority. And thereafter this privilege began to be sought after. And when in the Emperor Hadrian’s time [a century later] certain jurists asked for the privilege, he replied that it was a privilege to be

## *VII. Roman Legal System*

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granted, not asked for." Historians agree as to the significance of this new practice. Augustus' measure had made it now possible for Roman law to become a science, and thus to have a different fate in the world from Greek law and to form a new type in legal evolution.

The supreme period of Roman juristic science was reached in the 2d and 3d centuries A. D. By this period, the Roman legal instinct had developed far beyond that of any of the earlier races, Oriental or Greek. The administration of justice, on the one hand, had been separated from general political administration; and, on the other hand, justice by law had been differentiated from a primitive popular justice by referendum. The praetor had become the typical judge of our modern ideals, the first of the kind—secular, not priestly; a lawyer, not a layman; an adjudicator, not an administrator. Professional jurists in copious treatises expounded legal principles in systematic form. Schools of law-study arose and multiplied.

Five great names may be chosen from many, typifying these achievements,—Julian, the judge; Ulpian and Papinian, the counsellors; Quintilian, the professor; and Gaius, the jurist.

9. JULIAN, the judge,<sup>15</sup> made Roman practice cosmopolitan, doing for it what Lord Mansfield did for



VII. 15—JULIAN THE JUDGE

To him is attributed the authorship of the Perpetual Edict,—  
the first Code of Practice, as it would be called today

[ 421 ].



## VII. Roman Legal System

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English commercial law. He had already written a treatise numbering ninety books. But about A. D. 130, as praetor, he consolidated the various practice rules that had been annually announced by the preceding praetors of various jurisdictions, and compiled a single code of practice, thenceforth to be perennial, and known as the Perpetual Edict. A few passages will illustrate the style of this unique code,—the first published code of practice in any system:°

[*The Praetorian Perpetual Edict.*] “[11a] Parties sued at law must either appear in person or appoint a surety.

“[b] No one shall, without my consent first given, maintain a suit against his parent, his patron, or patroness, or the children or parents of a patron or patroness.

“[c] If such suit be instituted against a parent, or patron or patroness, or the children or parents of a patron, or his own children or any one in his wardship, or his wife, or his daughter-in-law, any person whosoever may be received as surety.

“[d] If a party has appointed a surety and then neither can be found nor is defended by his surety, I will order an attachment of his goods.

“[12] No one shall by force release a party sued at law nor by malicious contrivance aid his release. . . .

“[40] Bad faith. On a transaction found to have been done in bad faith, if no other remedy applies and adequate grounds appear, and less than a year has elapsed since first the party could have known of the bad faith, I will give judgment.

“[41] Minors under 20. A transaction with a person under 20 years of age, whatever the subject of it may be, I will declare censurable.

## 9. *The Judges*

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“[42] Civil incapacity. If any person, man or woman, is found to have become civilly incapacitated after any transaction done or had with him or her, I will give judgment against him or her, equally as if that fact had not supervened. . . .

“[61] Throwing or pouring into the highway. If on any place where a way is used by the public or where people are standing, any substance is thrown or poured, for the damage thus caused or done I will give judgment, in double amount, against the party there dwelling. If by such force a free citizen is found to have come to his death, I will give judgment for 50 M sesterces. If he lives and is found to have been injured, I will give judgment, against the party liable, for whatever sum shall appear to be just. If a slave is found to have done it without his master's knowledge, I will add to the order: ‘with privilege of surrendering the slave in lieu of money.’

“[62] No one shall maintain in or on the eaves of his house, over a place where the public uses a way or is standing, any article the fall of which could cause damage. If any one violates this, I will give judgment against him for 10 M sesterces. If a slave is found to have done it without his master's knowledge, I will order that he be defended by a surety or be surrendered in lieu of compensation. . . .

“[64] Gamesters. If any one assaults a person in whose house a dicing game is carried on, or otherwise does damage to him, or if at such time any article is taken from his house, I will not give judgment.

“If any person by reason of a dicing game has used force, I will proceed against him as may be necessary. . . .

“[104b] After the death of a person who is in wardship to another, or after he has been emancipated or manumitted or transferred, if as to his separate estate anything has been done in bad faith, by the party in whose wardship he was, to the diminution of the estate, then within one year after knowledge of the fact could have been obtained, I will give judgment. . . .

## VII. Roman Legal System

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"[188] Riot. If in the course of a riot any person is found maliciously to have caused damage or loss, I will give judgment against him, for double the amount of the damage if sued for within one year after knowledge could have been obtained, and for simple damages if after the year.

"[189] Fire, Collapse, Shipwreck, Forcible Capture of Raft or Vessel. If any one is found, in the course of a fire or building-collapse or shipwreck or forcible capture of a raft or vessel, to have converted or received in bad faith any article, or to have done any damage in the premises, I will give judgment quadruple the amount, if suit is brought within one year after knowledge could have been obtained, and for simple damages if after the year. Likewise I will give judgment against a slave or member of the household."

The forms of judgment used by the praetor at Rome have not come down to us. But the Egyptian papyri, preserving the doings of Roman administrators, in the Greek language used in that region, have furnished a few examples, which may be taken as fairly representative of the general style on Roman soil in the classic imperial period. The following entry, in Greek with a Latin copy, from the year A. D. 124, deals with a lawsuit over a will, and shows the parts played by judge, counsellor (*jurisconsult*), advocate, and clerk of court:<sup>p</sup>

[*Court Record of A. D. 124.*] "Extract from the record of proceedings of Blaesus Marianus, prefect of the first cohort of Cilician cavalry, by appointment of Haterius Nepos, chief prefect, in the 8th year of the Emperor Caesar Trojan Hadrian Augustus and Pharmiti XVIII [15 July A. D. 124], the counsellor Claudius Artemidorus being in attendance.

## 9. *The Judges*

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“Aphrodisius son of Apollonius against Ammonius son of Apio. Aphrodisius by his advocate Soterichus alleges that he had entered into marriage, without writing, with a certain woman Saraputa, and had by her had a son Origen, now deceased, and others; that the law vests in the father the inheritance of sons born of a marriage not contracted in writing; that the defendant now claims as heir to [the son] Origen under a will [of the said Origen]; that the latter had not, according to law, the power to make a will in favor of any third person during his father's lifetime; that the will made in favor of the defendant was therefore invalid and unjust; and that the plaintiff claims title to the property left by his son.

“Ammonius by his advocate Marcianus replies that the laws of Egypt accord power to all persons whomsoever to make a will leaving their property to whomsoever they may choose; that he the defendant, being the son of a deceased brother [of the plaintiff] had been made heir [by the will], together with another son [of the deceased brother]; and that the will had the required number of witnesses.

“Blaesius Marianus [said], ‘Read the will of Origen’, which being read was dated in the 8th year of Emperor Hadrian.

“Then Blaesius Marianus, prefect of the first cohort of Cilician cavalry, after consultation with the counsellor Artemidorus dictated the order here reading as follows to wit: Origen, the deceased, born to his father from a marriage contracted without writing, appears to have nominated an heir, but he had not the power to make a will during the lifetime of his father.

“And Ammonius [the defendant] then averring that Origen was the issue of a marriage contracted in writing and Aphrodisius [the plaintiff] on the other hand repeating his averment that Origen was not the issue of a marriage contracted in writing, Blaesius Marianus, prefect of the first cohort of Cilician cavalry [ordered] that Aphrodisius make proof of this fact within 60 days.

## VII. Roman Legal System

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"Aphrodisius then requesting that, during the status quo, an inventory be made of the property left by the deceased, Blaesus Marianus ordered Isidorus of the prefectorial staff to make an inventory in duplicate, and to deliver copies to the parties concerned, the key of the house to remain under seal in the custody of Ammonius. And a little later Isidorus reporting that this order had been complied with, Blaesus Marianus directed that the order of postponement be entered in the record."

Another but briefer record, apparently of an interlocutory proceeding, illustrates that in general features the style and contents of these court records were of a type strikingly similar to those of the English (unofficial) Year-Books and different from the English (official) court records; the parties here were Romans in Egypt:<sup>a</sup>

[*Court Record of A. D. 207.*] "Before Subatianus Aquila, 15th year of the reign of Phamenos XVII. On summons, Sabinus and Maximus Dionysius appeared. And after proceedings had, Aquila said [to the advocate Asclepiades], 'What have you to say as to the time of possession, which they assert was about 14 years after the purchase of the Pausorapis estate, and as to their silence during that period?' Asclepiades the advocate said: 'That was the fact.' Aquila said: 'The imperial [Roman] decrees apply to inhabitants of the provinces. If the right of possession has fallen to one person, and another person has started in occupation [of the premises] but not long enough to satisfy the legal [20-year] period, and the other party who claims title has been silent and made no opposition for more than 10 years, the title is to be validated of those who are in possession.'"

10. PAPINIAN<sup>16</sup> and ULPIAN, the counsellors, typify the practice of justice placed, where it always should be,





VII. 16—PAPINIAN THE COUNSELLOR

## VII. Roman Legal System

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in the hands of a legal profession, highly trained and wise. For us, these two bear also this sentimental distinction, that (with Paulus) they once dispensed justice in the island of Britain, as Roman magistrates in a Roman basilica.

PAPINIAN<sup>16</sup> was termed, in Justinian's Digest, "the illustrious"; for he had received the extraordinary distinction that among the five principal juriconsults, where they were divided in opinion, his opinion if recorded should prevail. But his truest fame should be that he died a martyr to his professional honesty; for when the ruthless Emperor Caracalla caused the assassination of his own brother, who shared the throne with him, and then directed Papinian, his attorney-general, to prepare a legal opinion justifying the deed, Papinian courageously refused, with the memorable words, "I do not find it so easy to justify such a deed as you did to commit it". And for this rebuke Papinian was himself put to death.

Of the style of "consultatio", or opinion, which these counsellors prepared, no textual examples from the classic period have survived. But from this later specimen (dating in the early A. D. 500's, and doubtless of inferior grade) we can re-construct the general type:

[*Opinion of a Juriconsult.*] "You have consulted me on the question whether an agreement for partition of an inheritance be-

## 10. *The Counsellors*

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tween brother and sister is valid when the woman (as you say) signed by command and under duress of her husband and without knowledge of the nature and effect of the terms contained or inserted in the said agreement.

“(2) My opinion is that the agreement as stated in your request for an opinion is void in law, and that it cannot stand, since it is entirely violative of the safeguards provided by the law.

“(3) And first, on the facts as you state them, according to the said laws concerning agreements accompanied by force, an agreement endangering liberty and exacted by fear is most plainly void; for it is definitely laid down that no one shall be compelled to promise against his will.

“(4) Furthermore, a passage of these well-known laws runs thus: ‘Which he did of his own free will and desire’. Who is so destitute of wisdom and lacking in intelligence as to assert that a contract should be valid and binding which a woman has signed under coercion in fear of her husband, and thus cannot be supposed to have had free will and independent discretion?

“(5) Furthermore, by the same principle of law above referred to, such an agreement is deemed to be of no effect, as the laws below quoted show.

“(6) Gregorianus Bk. II: ‘Emperor Severus A. Julius Constantinus. It has long since been decided that transactions executed through force and fear, should be void, even without the aid of the Prince: Approved July 1 in the consulship of Dexterus II and Priscus.’

“(7) Also another passage in the above cited volume: ‘Emperor Antoninus A. Julius Basilae. It is undoubtedly the law that agreements made against a person’s will or contrary to the laws and ordinances are void. PP. 28 July in the consulship of Antoninus IV and Albinus.’

## *VII. Roman Legal System*

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“(8) ‘Emperor Alexander A. Dionysius: “The passage providing that an agreement made in bad faith is void, etc. PP. 12 Aug. in the consulship of Alexander Augustus.’

“(9) Also other provisions in the same book and title: ‘Emperors Diocletianus and Maximianus A. A. Aurelius Heraclidus: If you without authority from your wife released a surety for her opponent, and it can be shown by plain documentary proof that this was done without her knowledge and against her will, the release will be of no effect. PP. 6 Sept. in the consulship of Diocletianus IIII and Maximianus III.’

“(10) Likewise other provisions in the same book and title: ‘Emperors Carus Carinus and Numerianus AA. Aurelius: Since, as you assert, the settlement was made for a fraudulent purpose, the authority of law makes void what was done between you: PP. 8 December in the consulship of Carinus and Carus.’

“(11) Therefore, if the laws are to be preserved and the statutes of the emperors are to be respected, the agreement of which we have been speaking has manifestly no force.

“(12) At this point, I have thought it worth while to quote the Theodosian law concerning agreements, because at the beginning of the said ordinance it runs thus: ‘If he has sought to repudiate agreements or settlements which he has executed of his free will and discretion, let him pay the penalty, lose the profits, and incur infamy’; but this applies to a person who had free discretion and not to one who acted unwillingly and had not the will to act.”

ULPIAN<sup>17</sup> was the author of that lofty definition, “Justice is the constant and perpetual will to allot to every man his due”. He wrote twenty-three treatises; and to his epigrammatic invention we owe many of our familiar law-Latin maxims, such as “*Volenti non fit injuria*”.





VII. 17—ULPIAN THE COUNSELLOR

It was Ulpian who defined Justice as "the constant and perpetual will to allot to every man his due"



## VII. *Roman Legal System*

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The logical development of the law that now ensued, through the writings of these juriconsults, may be illustrated by some passages from one of Ulpian's treatises.<sup>s</sup> In the concrete discussions of case-law and in the citations of precedents and opinions, their method, regarded as an original invention, is comparable with that of the Hebrew rabbis, the Hindu pundits, the Mohammedan muftis, and the Japanese judges:

[*Ulpian in Book XXIX of his Commentary on Sabinus:*] "According to Celsus, if property is sold and then is stolen before it is delivered to the purchaser, the latter has no right of action for conversion; the right still remains with the vendor. No doubt (he continues) he can be called upon to assign to the purchaser the action for conversion, and the other remedies as well; or if he should have already recovered anything himself by any of these actions, he must make it over to the purchaser: all this is sound law; and Julianus says the same. It is certain that the goods are at the risk of the purchaser, always provided the vendor exercises due care up to delivery.

"(1) So true is it that previous to delivery the purchaser has no right of action for conversion, that the question has been asked whether the purchaser is liable to the action if he converts the thing himself. What Julianus says is this (Dig. lib. xxiii): 'if, while it is the duty of the vendor to see to the thing being safe, the purchaser carries it off, having first paid the price, the latter is not liable; but if he takes it without paying, then no doubt he is liable; it is just as if he had taken away his creditor's security.' (2) It may be added that a tenant has the action, though he is not owner, as he has the requisite interest. (3) With regard to the case of a depositee, it is a fair question whether he has the action or not. But he is only re-

## 10. *The Counsellors*

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sponsible for fraud, consequently the law is, and very reasonably, that he has no right of action for conversion. In fact, if he committed no fraud, where is his interest? If he did commit fraud, then, no doubt the risk is his, still he cannot acquire a right of action by his own fraud. (4) This is in keeping with what Julianus says (Dig. lib. xxii):—‘as it is established law in respect to converters in general that they cannot bring an action for conversion in respect of a thing they converted themselves, it follows that a depositee will not be able to bring the action, however true it is that when a man wrongfully handles a thing it puts it at his risk.’ (5) Papinian discusses the following case: ‘I held two slaves as security for 10 aurei, and one was converted, but the other by himself (the one that remained) was worth as much as the sum secured. If I sue for conversion, am I obliged to make my unit of damages 5 and no more, on the ground that the slave remaining is good for the other 5; or is it the proper view, seeing that that slave may chance to die, that I ought to make the unit 10, even though the slave I have still got is of ample value?’ This last is Papinian’s own opinion; we ought not, he says, to consider the security the converter left untouched, but the one he took. (6) He adds the following:—‘If a slave is converted from me whom I held as security for a debt of 10, and I recover 10 from the converter by an action for conversion, then, if the slave should be converted again, I have no right of action, having no longer any interest, as I have already recovered once. That is, always provided that the conversion was through no negligence of mine; if the negligence was mine, then I can sue, as I have the requisite interest, because I am liable on the action for redemption. Assuming that there is no negligence on my part, then the action, which, as we have seen, is not open to me, can certainly be brought by the owner’. This opinion is supported by Pomponius (ad Sabinum lib. x). (7) These writers also hold that if the two slaves above mentioned should both be converted on the same occasion, the pledgee has the action in respect of each, that is to say, not in respect of each for the whole debt, but for such portion of the debt

## *VII. Roman Legal System*

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as represents his interest in that particular slave, the portion being ascertained by dividing the debt proportionally to the values of the slaves; but if the two slaves are converted at different times, then if the creditor recovers the whole debt in respect of one, he will get nothing by an action brought in respect of the other. . . . .

"In the action for conversion the thing taken need only be so far described as to be identified. (1) The weight of receptacles need not be given, it is enough to say, 'a dish,' 'a discus,' 'a cup'; but the material should be given, such as gold, silver, etc. (2) If the subject of the action is unwrought silver, it should be described as a mass of silver, and the weight should be given. (3) In the case of silver coins, the plaintiff must give the number, and similarly he would have to say that so many gold coins or more have been taken from him. (4) As to an article of dress, the question has been raised whether the colour should be specified. No doubt this ought to be done; in the case of a gold cup you specify the material, and in the same way you ought to give the colour of clothes. It is true that if a man declares on oath that he cannot say for certain what the colour is, he must be excused this particular requirement."

11. QUINTILIAN, the teacher, has left for us the best record of the combined art of the advocate and the practitioner. He was the first official professor of law ever appointed. For twenty years (about A. D. 68-88) he lectured on the art of advocacy, and students flocked to Rome from all Italy and the distant provinces to receive his instructions. His work on "The Education of the Advocate" teems with observations and precepts which fit the conditions of the Anglo-American bar today as well as the Roman bar of eighteen centuries ago.<sup>18</sup> His twelfth book should be mastered by every young lawyer; and the

indita piget nec semel audisse sit satis cogendus eadē itē ac se-  
 , ut in iniquior nō solum quia et hūc aliqua pīma expōitione  
 potuerit pīam hūc, qd ē pīe euenit ipentia: Sed & ut suauis  
 in eadē dicit plim nō mentit & nō non docuit causā s; agitur  
 nō ut in pīmonio s; ut iudice loquatur. Quapp mīq; satis crededi ē  
 sed agnādus oīo modis & turbādus & euocādus: nā ut medicis nō  
 apparet nō uiaa curanda sūt s; & inuenienda quae latet sēp ea ipī  
 qui sanandi sūt cautius: ita aduocatus plura q̄ ostendit aspiciat  
 nā ay satis laudiendo pauentē ipendit in alijs tursus a pīona mī  
 cundus ē agendusq; adūlatius pīponen quā oīo excoitāt contra  
 pōt. quicqd itapi in cuiusmōi dīstīpatione nā Interrogādus q̄ illi  
 nīssimē ac pīmendus nā dū oīa querimus aliqū ad uerū ubi mīme  
 expectamus pīuimus. In summa opus ē i dīscendo patronus credū  
 lus pīmitte nō hōgator oīa tēstī populi patīstīal assignationes. Ipī  
 deniq; adūlatūy quēdā nō negatur. I deoq; opus ē inueni oīe hūc  
 i nīu mēntūy qd uidet nō ē satis pīcendūy tēst. Nā sī frequēssīe aut  
 nō sūt oīo quae pīmitte bāt aut mīnus cōuenit aut cū alio aliquo nō  
 atūo pīmixta sūt aut mīma sūt & sīdī hoc ipō detrachūa q̄ nō hnt  
 modū deniq; līnū ruptūy aut turbat. cetera aut sūt agitur signa  
 sīquet dīuēt: quae nīl domi exūssit in foro dīpnatī dēpīet plū  
 q̄ nōcūit dēstīnata q̄ nō pīnulla nouissēt: Multa & quae lītīgator  
 nīl ad cām pīuēt crediderit patronus seruet: mō pōt quā nāclīdī  
 mīl atq; mītoy locat: quos ut atā spectat in agendo ac atēpta  
 te sīngulol mīme cōuenit: pōt quā dīcimus cāl: ita in dīscendo rī  
 marī nēcūy ē quae pīonē quae ipīa quae loca i nīnuta i nīnuta tēst  
 ita: sēquib; nō nī illud qd artīfīcīalē pīationis gēnū collīgi possit:  
 sed q̄ mīuētī tēst: quā sūt rēstēndī: nā pīmūy rēstēndī iudīa rēst  
 an odio an cōtēptu laborēt: quoy fērt pī pīma sūpīorē pīma patī  
 tēstū hūīorē pīmit: Sic causā pīcūtātūl pīpīat an oīol oīol  
 quae pīnt notat ut tēstāy dēīndē pīonay induat iudīcī fīgātq; apd  
 sē agī cām: sē q̄ ipī mōuissēt de eadē rē pīuīa tēstūy id potēssimūy  
 apd quēcūq; agēt exīstīmet: Et sic cū raro fūllēt tēstūy aut culpa iudī  
 al cū: l. Quā sēmandī mī pīndī: nō cōuenīat

**O** Vē sūt i agendo sēmandā toto fērt opē excoitū sumus pau  
 ca mī pīna hūīl loci quae nō tam dīcēndī aut q̄ oīstīal agēndī

# VII. 18—QUINTILIAN'S "EDUCATION OF THE ADVOCATE"

The passage quoted in translation begins at the ninth line

## VII. Roman Legal System

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insight and aptness of his comments reveal how little the human nature of law-practice has changed in two thousand years. Here is an illustrative passage upon preparation for trial:<sup>t</sup>

[*Quintilian, on Preparation for Trial.*] [Book XII, c. VII, par. 10.]

"10. When the advocate [consulted by the client] has exercised sufficient patience in listening to the client, he must then assume another character, and act the part of the adversary; he must state whatever can possibly be imagined on the other side, and whatever the nature of the case will allow in such a discussion of it. The client must be questioned sharply and pressed hard; for, by searching into every particular, we sometimes discover truth where we least expected to find it.

"11. In a word, the best advocate for learning the merits of a cause is he that is least credulous; for a client is ready to promise everything,—offering a cloud of witnesses, and sealed documents quite ready, and averring that the adversary himself will not even dispute certain points.

"12. It is therefore necessary to examine all the writings relating to a case; it is not sufficient to inspect them; they must be read through; for very frequently they are either not at all such as they were asserted to be, or they contain less than was stated, or they are mixed with matters that may injure the client's cause, or they say too much, and lose all credit from appearing to be exaggerated.

"13. We may often, too, find a thread broken, or wax disturbed, or signatures without attestation; all which points, unless we settle them at home, will embarrass us unexpectedly in the Forum; and evidence which we are obliged to retract will damage a cause more than it would have suffered from none having been offered.



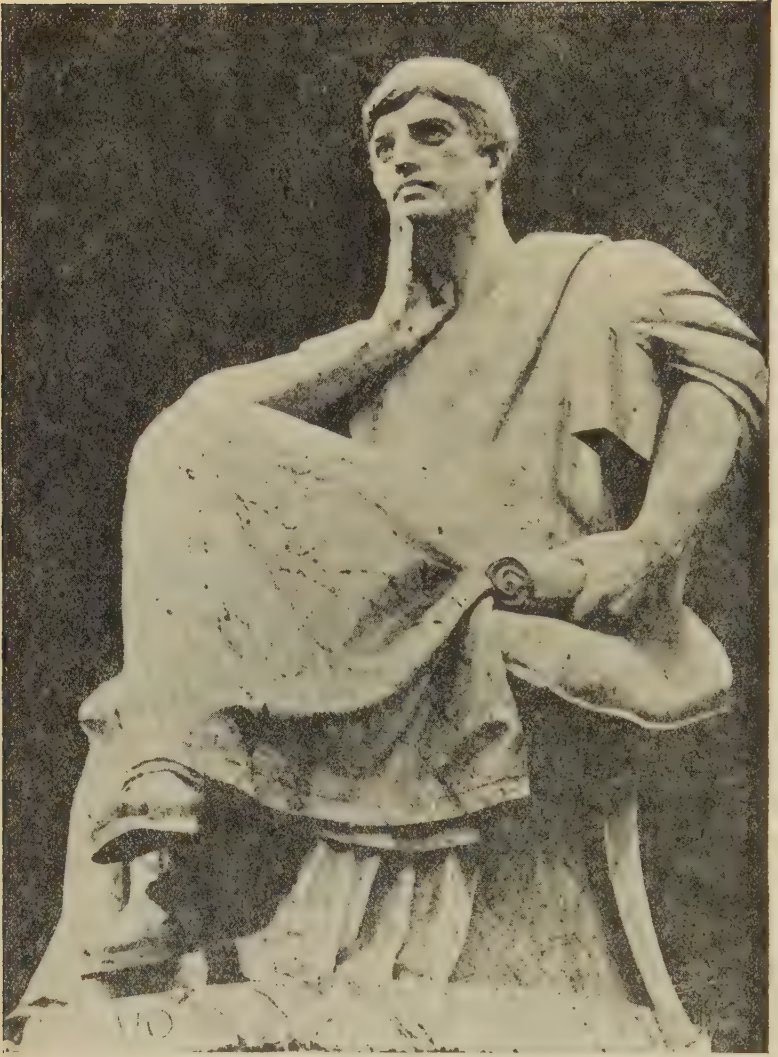
## 11. *The Teachers*

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"14. An advocate will also bring out many points which his client regarded as having no bearing on the case, if he but go over all the grounds which I have previously specified for arguments; and as it will be by no means convenient to review all these, and try them one by one, while we are pleading, for the reasons which I have given, so, in studying a cause, it will be necessary to examine minutely what sort of characters are concerned in it, what times, or places, or practices, or documents, have any reference to it, and all other particulars, from which not only artificial proofs may be drawn, but it may be ascertained what witnesses are to be feared, and how they are to be refuted; for it makes a great difference whether an accused person suffers under envy, or dislike, or contempt, of which the first is generally directed against superiors, the second against equals, and the third upon inferiors.

"15. After having thus thoroughly examined a cause, and brought before his eyes everything that may promote or hinder its success, let him, in the third place, put himself in the place of the judge, and imagine the cause to be pleaded before him; and whatever arguments would move him most if he had really to give judgment on the matter, let him suppose that those arguments will have most effect upon any judge before whom it may be brought. Thus the result will seldom disappoint him; or, if it does, it will be the fault of the judge."

12. GAIUS, the jurist, typifies the advent of law as a science.<sup>19</sup> One of Gaius' treatises, the *Institutes*, served as the text-book of legal study for three centuries after his death (which occurred perhaps about A. D. 200), and is the only Roman law-book, prior to Justinian, that has survived to us in fairly complete text. Totally lost for fourteen centuries, it was found again, by luck, a hundred years ago. The original text looks hopelessly

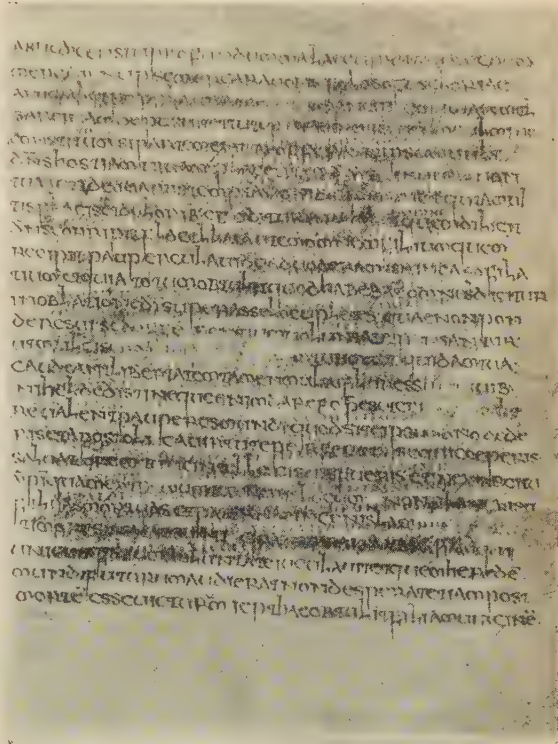


VII. 19—GAIUS THE JURIST

Gaius' surviving treatise marks him as a genius in legal science.  
But less is known of his personality than of Shakespeare's

## 12. *The Jurists*

indecipherable;<sup>20</sup> for the manuscript is a palimpsest, that is, written originally on a parchment over which a mediæval monk had later written the life of a saint, after carefully erasing Gaius' text. But modern scholarship and chemistry triumphed and restored to knowledge this priceless book.<sup>21</sup>



### VII. 20—GAIVS' INSTITUTES

This is the appearance of the parchment when Niebuhr first saw it and detected beneath the monk's writing the original obscure law-text

Gaius' book introduces us to the new element in legal thinking,—generalization of concrete rules, by classification and abstraction, into principles forming a system. Its distinctive nature can best be seen in the following extracts:<sup>22</sup>

[*Gaius' Institutes, Book First.*] §1. "The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules enacted by a given state for its own members are peculiar to itself, and are called civil law; the rules prescribed by natural reason for all are observed by all nations alike, and are called law of nations. So the laws of the people of Rome are partly peculiar to itself, partly common to all

1 de iurciuitetnat

quepopulusipsesiβiuiusconstituitidipsius  
pproprium e uocat'q iuscuiuequasuiuspro  
priumciuitatisquānatu rali spratioj hominē  
hominesconstituitidar omnespopulos p  
lequecustoditur uocaturqueiusgentiu  
qsiq iureomnesgentesutunt'populusita  
queromānusparitmsuopropriopartim  
munio mniū hominū iureuit qūalesin  
cula illasint suislocispponemus  
CONSTANTATIURAPREXLEGIBUSPLEBISCITISSE  
NATUSCONSULISCONSTITUTIONIBUSPRINCI  
PUMEDICTISEOR'QUIIUSEDICENDI HABENTPR  
PŌNSIPPRUDENTIUM  
LEXEPOPULUSIUBERATQUECONSTITUITPLEBIS  
CIT E PLEBSIUBERATQUECONSTITUITPLEBSAT  
APOPULOEDISTATGPOPULIAPPELLATIONEUM  
UERSICIUESSIGNIFICANTURCONNUMERATIS  
ETPATRICI'PLEBISALTAPELLATIONESINERATRICI  
CISCEPERICIUESSIGNIFICANTURUNDEOLIMPA  
TRICIINDICEBANTPLEBISCITISSENONTENEBAT  
SINEAUCTORITATEMEOPIUMFACTAESENTS'P' TOL

"§2. Roman law consists of statutes, plebiscites, senatusconsults, constitutions of the emperors, edicts of magistrates authorized to issue them, and opinions of jurists.

“§3. A statute is a command and ordinance of the people: a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the

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## 12. *The Jurists*

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people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians. . . . .

“§8. Every right which we exercise relates either to persons, or to things, or to actions; and let us first examine the law of persons.

“§9. The first division of men by the law of persons is into freemen and slaves.

“§10. Freemen are divided into freeborn and freedmen.

“§11. The freeborn are free by birth; freedmen, by manumission from legal slavery.

“§12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order, and commence with freedmen assimilated to enemies surrendered at discretion

“§48. Another division in the law of persons classifies men as either dependent or independent.

“§49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation:

“§50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

“§142. Let us now proceed to another classification: persons not subject to power, nor to hand, nor held in mancipation, may still be subject either to guardianship or to administration, or may be exempt from both forms of control. We will first examine what persons are subject to guardianship and administration, and thus we shall know who are exempt from both kinds of control.

“§143. And first of persons subject to guardianship or tutelage.

“§188. The foregoing statement shows the various kinds of guardian: the question of the number of species to which these kinds



## *VII. Roman Legal System*

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may be reduced involves a long discussion, for it is a point on which the ancient jurists differed greatly; and as I have examined it at length, both in my interpretation of the Edict and in my commentary on Quintus Mucius, for the present occasion it may suffice to observe that some, as Quintus Mucius, make five species; others, as Servius Sulpicius, three; others, as Labeo, two; others make as many species as there are kinds of guardian. . . . .

[Book Second.] “§1. In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.

“§2. The first division of things is into two classes: things subject to divine dominion, and things subject to human dominion.

“§3. Subject to divine dominion are things sacred and things religious.

“§4. Sacred things are those consecrated to the gods above; religious, those devoted to the gods below . . . . .

“§10. Things subject to human dominion are either public or private.

“§11. Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion.

“§12. Again, things are either corporeal or incorporeal.

“§13. Things corporeal are tangible, as land, a slave, clothing, gold, silver, and innumerable others.

“§14. Things incorporeal are intangible; rights, for instance, such as inheritance, usufruct, obligation, however contracted. For though an inheritance relates to things corporeal, and the fruits of land enjoyed by a usufructuary are corporeal, and obligations generally relate to the conveyance of something corporeal (land, slaves, money), yet the right of succession, the right of usufructuary

## 12. *The Jurists*

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enjoyment, and the right of the contractor, are incorporeal. So are the rights attached to property in houses and land, denominated *servitudes* or *easements*."

Gaius' classical definition, above quoted, "Every right that we exercise pertains either to persons or to things or to actions", has since served as a basis of juristic discussion during two thousand years. Whether sound or not, it is of momentous significance, for it marks the dawn of legal science in the world. In all the literature of the legal systems prior to the Roman there are no abstract generalizations of the body of positive law,—no jurists treating the rules as a logically connected system. It was this contribution which we owe distinctively to the imperial period of Roman law; and it is this feature which made it possible, a thousand years later, for the mere resurrected texts of the obsolete Roman law to stimulate new thought in the sturdy crude Germanic regions of law, and to lead ultimately to modern juristic science.

### (III) PERIOD OF THE LATER EMPIRE

13. In Gaius' time the Roman Empire included a population of perhaps one hundred and fifty million persons. But during the next three centuries, it became topheavy; and by Justinian's time, A. D. 520, it had been divided into the Eastern and Western Empires. The fierce Goths had twice besieged Rome. Ravenna, in

## *VII. Roman Legal System*

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Northern Italy, had become the Western center; and in that city may still be seen the celebrated mosaic of Justinian and his ministers. Byzantium, or Constantinople, where Greek civilization prevailed, became the Eastern and finally the only center. Native Roman legal thought had long been atrophied, and Byzantine jurists now practiced Roman law in Greek. But the classical treatises of the Roman jurists were still venerated as controlling authorities.

Finally, about A. D. 550, Justinian, at Byzantium, undertook to reduce the now enormous bulk of law to manageable form. The result was the famous Pandects, or Digest, the Code, and the Institutes. The first represented a culling from the most approved juristic writings; the second, a compilation of the Imperial legislation; and the third, a students' handbook of the law. For the Digest,<sup>23</sup> in three short years they collected and examined two thousand books, containing three million sentences or paragraphs; and reduced them to about one hundred and fifty thousand sentences. All the original Latin treatises, from which the choice passages had been culled, were forbidden ever again to be cited, under heavy penalty; and in fact they have all perished, Gaius' Institutes alone surviving by accident.

The world-fame of Justinian rests on this Digest, and it was indeed compiled under his supervision; Benjamin



## *VII. Roman Legal System*

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Constant's great painting has depicted the scene.<sup>24</sup> But Justinian's preface gives full credit to the commission of seventeen jurists, chaired by Tribonian, the most learned man of the age, to whom the purple-robed emperor committed the huge task. All of these jurists were Byzantine Greeks. Even the Preface to the Digest was promulgated in Greek; and these Roman principles, in Greek paraphrases, survived for some time in the Oriental regions.

14. But Italy, by this time, was overrun and being settled by the Germanic invaders, whose legal system then dominated. This Latin Digest itself disappeared from general knowledge for five centuries, so that only one complete and reliable copy was ever found again. The time appointed by Fate had arrived for the downfall of the Roman system.

Rome's magnificent edifices<sup>25</sup>—the Capitol with its priceless library of legal records, the superb Forum, the splendid court-houses—were destroyed by fire and siege. All relics of paganism were despised by the fanatics of the new religion. The pillared porticoes that once had echoed the voices of Julian and Papinian were plundered to patch the walls of some medieval shrine or castle; and thousands of sculptured marbles were burned in lime-kilns to make common mortar. The devastated Forum became a cattle pasture. Its very name was forgotten; and from the

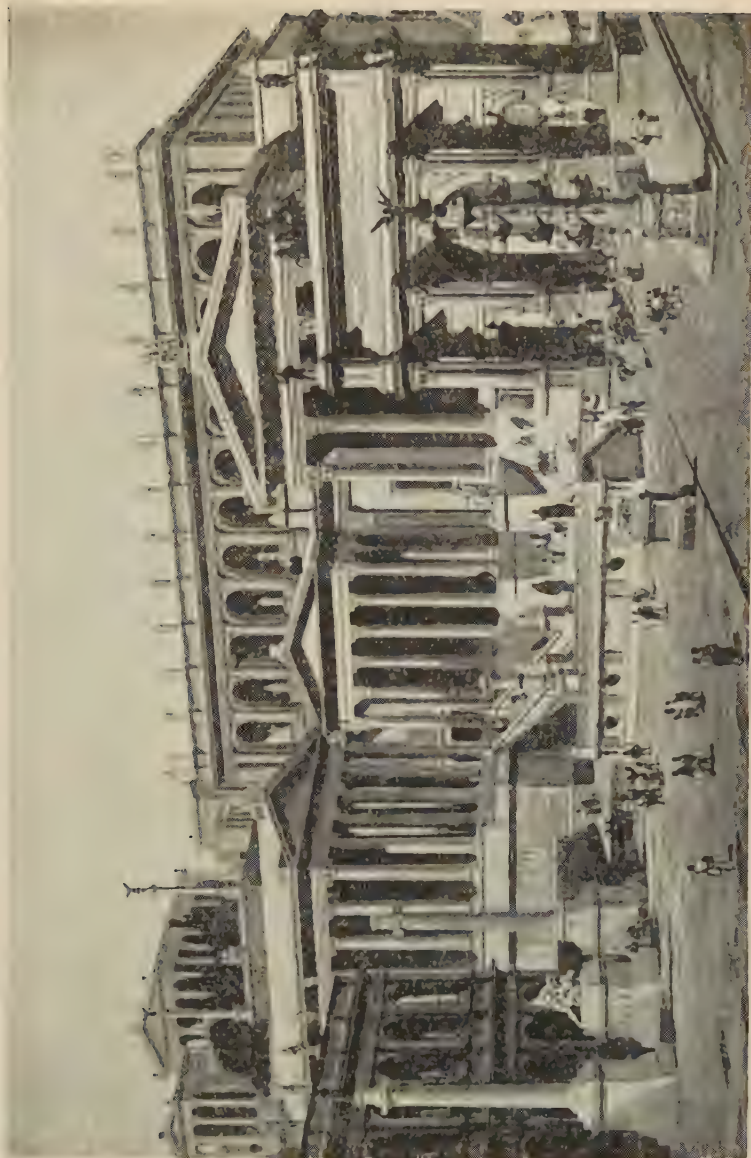






VII. 24—JUSTINIAN PRESIDING OVER THE COMPILATION

These jurists were Byzantine Greeks, compiling the classic passages from the Latin treatises of three centuries before



VII. 25—THE FORUM

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middle ages to modern times it was known only as "the Cattle Field".<sup>26</sup>

Once, five centuries before, at Rome's zenith, as when the apostle Paul was accused of crime, in a far eastern city, before the Roman governor Festus, he could boldly claim the rights of his Roman citizenship. "I ought to be judged before Caesar, and I appeal unto Caesar", said Paul. And Festus answered, "Thou hast appealed unto Caesar, and to Caesar thou shalt go". But now, never again could a Roman citizen throughout a broad empire appeal to Caesar's justice. Jurisprudence had been the one science of the Romans; and with the Roman government it perished in Europe. The justice of the Caesars was no more.



VII. 26—THE DESERTED FORUM IN THE MIDDLE AGES  
For more than a thousand years it was known only as The Cattle Field



## VII. Roman Legal System

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### Sources of Illustrations

1. *Map of the Roman Empire.* From Keith Johnston, "The World Classical Atlas", plate 12 (W. & A. K. Johnston, Edinburgh, no date).
2. *Forum.* From a photograph by R. Solano, Rome, of an unidentified drawing.
3. *Senate Resolution De Bacchanalibus.* From the facsimile in "Corpus Inscriptionum Latinarum", vol. I, Atlas, "Tabulae lithographae", ed. Ritschel, plate XVIII (Berlin, 1862).
4. *Lex Julia Municipalis.* From a photograph of the original, furnished by the Director of the National Museum at Naples, 1923.
5. *Lex Coloniae Genetivae Juliae.* From the facsimile in M. R. de Berlanga, "Los Bronces de Osuna", Appendix (Malaga, 1873).
6. *Genoa Judgment.* From a facsimile published by the Municipal Museum of History and Arts, at Genoa.
- 7, 7. 1 *Contract to Build a Gateway.* From a photograph of the original, furnished by the Director of the National Museum at Naples; there is also a facsimile in Otto Gradenwitz, "Additamentum", vol. 2, "Simulacra", to C. G. Bruns, "Fontes Juris Romani", 7th ed. (Tübingen, 1912); the design is given in "Corpus Inscriptionum Latinarum", cited *supra*.
8. *Hortensius.* From a photograph made for the author by Alinari Bros., Rome, of the statue in the Palace of Justice, Rome.
9. *Cicero.* From a photograph by Alinari Bros., Rome, of the bust in the Capitoline Museum.
10. *Cicero's Speech against Catiline.* From a photograph by Alinari Bros., Rome, of the painting by Maccari in the Senate House (Palazzo Madama).
11. *Ulpian Court-House.* From a photograph by R. Solano, Rome.
12. *Constantine Court-House.* From a photograph by Carlini & Mori, Rome.
13. *Jesus Arraigned before Pilate.* From a reproduction of the painting by Michael Munkacsy, owned by Rodman Wanamaker, Philadelphia (copyright). No eye-witness account of a praetorian criminal trial at Rome is extant. But the scene has been reconstructed in fiction with master hand by a modern scholar: E. Lucas White, "Andivius Hedulio; Adventures of a Roman Nobleman in the Days of the Empire", c. 37, p. 549 (New York, Dutton, 1921).

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15. *Julian the Judge*. From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.
16. *Papinian*. From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.
17. *Ulpian the Counsellor*. From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.
18. *Passage from Quintilian*. From a photograph, furnished by *Albert S. Osborn*, of New York, of the manuscript in the Laurentian Library at Florence.
19. *Gaius*. From a photograph made for the author by *Alinari Bros.*, Rome, of the statue in the Palace of Justice.
20. *Gaius' Institutes, Original MS*. From the facsimile of the original (in the Verona Library) in "Gai Codex Rescriptus . . . phototypice expressus" (Leipzig, Karl W. Hiersemann, 1909, from plates made by the *Danesi Co.*, Rome).
21. *The Same, Restored*. From the facsimile in the edition by *W. Studemund* (Leipzig, 1874).
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24. *Justinian Presiding over the Compilation*. From a photograph of the painting by *Benjamin Constant*, in the Ringling Museum of Fine Arts, at Sarasota, Florida.
25. *The Forum Buildings*. From a photograph of the reconstruction by *E. Becchetti*, of the Royal Academy of Fine Arts, Rome.
26. *The Deserted Forum in the Middle Ages*. From the drawing in *F. Hoffbauer* and *H. Thèdenet*, "Le Forum Romanum", p. 87, plate 5 (Paris, Plon, 1905).

## VII. Roman Legal System

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- a. Twelve Tables. From the translation in *Kocourek and Wigmore's "Evolution of Law Series"*, vol. I, p. 465 (Boston, Little, Brown & Co., 1915).
- b. Lex Julia Municipalis. Revised from the translation in *E. G. Hardy*, "Roman Laws and Charters", p. 151 (Clarendon Press, 1912); the Latin text is in *P. F. Girard*, "Textes de droit romain", 5th ed., 1893, p. 80.
- c. Lex Coloniae Genetivae Juliae. From the translation in *E. G. Hardy*, "Three Spanish Charters", p. 23 (Oxford, Clarendon Press, 1915).
- d. Genoa Judgment B. C. 100. MS. translation (Latin text in "Corpus Inscriptionum Latinarum", vol. I, plate XX, and p. 453) from the Italian translation in the Catalogue of the Museum of History and Arts at Genoa.
- e. Contract to Build a Gateway. From a MS. translation by *O. Floyd Long*, professor of Latin in Northwestern University.
- f. Deed of Realty. Translated from the text in *Girard* (cited *supra*), p. 851.
- g. Will. Translated from the text in *Girard* (cited *supra*), p. 805. Another version will be found in Messrs. Hunt & Edgar's "Select Papyri", vol. I, p. 251 (Loeb Classical Library, 1932).
- h. Gibbon. "Decline and Fall", c. XLIV (vol. 5, p. 273, ed. *Smith*, Boston, 1854.)
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- m. Sophists' Trial. From *Eunapius*, "Lives of the Philosophers", transl. *W. C. Wright*, p. 469 (Loeb Classical Library, 1922).
- n. Pomponius. From the Digest, I, 2, 2, 49.
- o. Julian's Edict. MS. translation from the text in *Girard* (cited *supra*), p. 137.
- p. Court Record A. D. 124. Translated from the text in *Girard* (cited *supra*), p. 899. The military title of this judge was probably only honorary, for Egypt had been subjugated a century before. Cicero on a visit to Greece took with him a military commission.

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- g. Court Record of A. D. 207. From a MS. translation by *O. Floyd Long*, professor of Latin in Northwestern University, from the text in *Girard* (cited *supra*), p. 907. A facsimile of the original record has been shown *ante*, chap. I (Egypt), plate 11.
- r. A Counsellor's Opinion. From a MS. translation by *A. Kocourek*, professor of Law in Northwestern University (text in *Girard*, cited *supra*, p. 621).
- s. Passage from Ulpian. From the translation in *C. H. Munro*, Digest XLVII, 2, De Furtis, p. 25 (Cambridge University Press, 1893). But "furtum" has here been translated "conversion".
- t. Passage from Quintilian. From the translation by *John Selby Watson*, p. 424 (London, 1856).
- u. Passage from Gaius. From the translation in *Edward Poste*, "Elements of Roman Law, by Gaius" (2d ed., 1875): But for C. 1, §8, has been used the correct translation of *Joseph I. Kelly*, in *Illinois Law Review*, VI, 561.

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THE  
JAPANESE  
LEGAL SYSTEM



## Prologue to Chapter VIII

The legal systems described in the foregoing chapters all arose prior to the Christian era.

Following the chronological order of origin, the next in time were the Germanic and the Keltic systems (for although these two do not appear in written records until several centuries after the Christian era opened, there can be no doubt, especially for the Keltic, that their legal ideas were well developed in tradition and custom before the Christian era).

Nevertheless, the subsequent story of their development links them so closely with the later European systems that the narratives of all can best be placed together in sequence.

At this point, then, we may digress to describe the two remaining Oriental systems (Japanese, Chap. VIII, and Mohammedan, Chap. IX), whose origins come next in date; leaving the Keltic (Chap. X) and the Germanic (Chap. XII) to take their natural place in the European story.



## VIII

### *The Japanese Legal System*

#### (I) *First Period, A. D. 500-1200*

1. Immigrant races.
2. Laws of Shotoku Taishi—Confucian morality the basis.
3. Later codes—Early conveyancing—Rule of the palace intellectuals—The Fujiwara family—Transfer of power to the military barons.

#### (II) *Second Period, A. D. 1200-1600*

4. Yoritomo, founder of the feudal Regency.
5. Code of Jo-yei—The Supreme Court.
6. Civil war again.

#### (III) *Third Period, A. D. 1600-1850*

7. The Tokugawa dynasty, and Iyeyasu the founder—Three centuries of peace—Commercial development.
8. Legal development under the Supreme Court.
9. Laws not published—Handbooks of instruction for magistrates—Trial methods—Oka the famous judge—Local village codes.
10. Conciliation before litigation—Parties' settlement record of A. D. 1853.
11. Development of law by judicial precedents—The three jurisdictions—The Supreme Court—Rules of procedure—Revision by reference from the trial judge—Record of a partnership lawsuit—Use of precedents—Supreme Court opinion on survival of liability.

#### (IV) *Fourth Period, A. D. 1850+*

12. Japan opened to foreign commerce—Revolution and a written Constitution—New Codes and Old Institutions.





VIII. 1—MAP OF FEUDAL JAPAN

## VIII

# The Japanese Legal System



THE islands of Japan form, for the continent of Asia, almost the counterpart of the British Isles and the continent of Europe.<sup>1</sup> Racially, and legally also, the two have their analogies; for each was settled in succession by several races, and each shared in an imported continental civilization, so that no separate and indigenous legal system arose until late in their history, and then only because of their insular isolation and spirit of independence.

Four periods in Japanese legal history may be distinguished: (I) from A. D. 500 to A. D. 1200; (II) A. D. 1200-1600; (III) A. D. 1600-1850; (IV) The present century.

### (I) FIRST PERIOD

1. The islands were invaded, before the Christian era, by two different streams of immigrants, not Chinese, coming in succession from the Manchurian and the Malayan regions,—much as the Kelts and the Germanics in turn entered and occupied Britain. These immigrant peoples had a strong clan and family structure, which lasted into modern times; and they made their way, like all peoples of that period, by militant force. After several centuries of struggle and settlement, a period of organized

## VIII. Japanese Legal System

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political dominion arrived. In the A. D. 300's writing had been brought from China; in the 600's, the extant historical records begin. The Buddhist religion<sup>2</sup> and the Confucian morality now came from China in overwhelming waves,—much as Patrick was bringing the Christian gospel and Latin letters to Ireland, at almost the same moment in the world's history (*post*, Chap. X). A centralized royal power develops. The texts of royal edicts begin, embodying the new religion, the new philosophy of government, and the new arrangements for land-tenure, taxation, and justice.



VIII. 2—BUDDHIST TEMPLE-TOWER AT IKEGAMI





VIII. 3—SHOTOKU TAISHI

The first legislator-prince. The figures on either side are his two sons



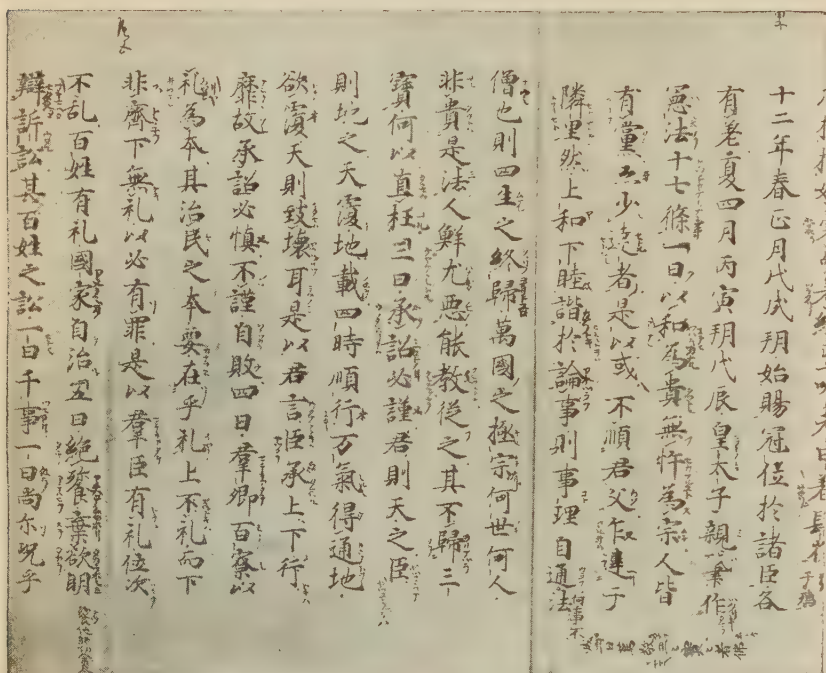
## 2. *Earliest Laws*

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2. In this period (A. D. 600-1200) comes the first constructive pronouncement of law (A. D. 604)—the Jushichi Kempo, or Seventeen Maxims, of the royal prince-regent Umayado, afterwards known as Shotoku Taishi (or, Prince of Saintly Morals) for his leadership in Buddhism, and as Togoto-mimi (or, Master Prince of the Law) for his leadership in justice.<sup>3</sup> The tradition about him is that he was able to speak at birth; and that when he grew up he was so wise that he could attend to the suits of ten men at once and decide them all without error. When Shotoku died (A. D. 621) “all the nobles and people of the kingdom filled the highways with the sound of their lamenting,—the old, as if they had lost a dear child, had no taste for salt and food in their mouths, the young, as if they had lost a beloved parent . . . . . The farmer ceased from his plough, and the pounding woman laid down her pestle. They all said:—‘The sun and moon have lost their brightness; heaven and earth have crumbled to ruin: henceforward, in whom shall we put our trust?’”<sup>a</sup>

The Seventeen Maxims of Shotoku, however, like the Ten Commandments of the Hebrews, are essentially not rules of law, but a short code of political and social morality. Politically they foreshadowed the consolidation of the new territories under a single royal power,—

# VIII. Japanese Legal System



## VIII. 4—THE SEVENTEEN MAXIMS OF SHOTOKU TAISHI

This is the oldest code of politics in Japan

analogous to Clovis' aspiration to dominion over all the Germanic settlements in Western Europe. Socially, they represented the adoption of Confucianism (as Clovis adopted Christianity); indeed many of the passages are recognizable as literal copies from some of the Confucian sages,—as for example, Law IV:<sup>b</sup>

<sup>a</sup>[*Shotoku Taishi's Law IV.*] "The Ministers and functionaries should make decorous behaviour their leading principle, for the

## 2. *Earliest Laws*

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leading principle of the government of the people consists in decorous behaviour. If the superiors do not behave with decorum, the inferiors are disorderly: if inferiors are wanting in proper behaviour, there must necessarily be offences. Therefore it is that when lord and vassal behave with propriety, the distinctions of rank are not confused: when the people behave with propriety, the government of the Commonwealth proceeds of itself."

And the duty of the judge to be impartial is declared in terms which echo down along the ages since Egypt, but are here borrowed from a Chinese sage:<sup>c</sup>

*Law V*: "Deal impartially with the suits which are submitted to you. Of complaints brought by the people there are a thousand in one day. If in one day there are so many, how many will there be in a series of years? If the man who is to decide at law makes gain his ordinary motive, and hears causes with a view to receiving bribes, then will the suits of the rich man be like a stone flung into water, while the plaints of the poor will resemble water cast upon a stone. Under these circumstances the poor man will not know whither to betake himself".

3. During the remainder of this period the three distinctive features are: (1) the establishment of a centralized system of law and justice for the newly conquered domain, on the model of the Chinese philosophy of government; (2) the development of a system of conveyancing for private transactions; and (3) the absorption of the royal power by the civil officers of the court.

(1) The first strictly legal code is a group of short enactments of A. D. 645-6 in the 2d year of the Emperor Kotoku, instituting the Chinese administrative organiza-

### *VIII. Japanese Legal System*

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tion, fixing the land-titles, and reforming the taxation system. This legislation, known as the Decree of Great Reform (Taikwa), placed for the first time the emperor in a status comparable to William of Normandy after his conquest of England. Among later enactments (for which, in general, Chinese models were used) the most notable was the Code of the Taiho period (A. D. 701), covering the same scope, but much more elaborate than the preceding; some of its provisions on land-tenure were deemed to be still in force a thousand years later.

No original MS. of the Taiho Code now remains; but in A. D. 718 (period Yoro) a revised code was enacted, known as Yoro-ryo, and certain minor regulations for its enforcement, known as the Konin-shiki, were later promulgated in the period Konin (about A. D. 820); of this Konin-shiki a small portion in the original text is still preserved; this is therefore the oldest manuscript of Japanese legal enactments now extant.<sup>5</sup>

Among other features of this legislation is notable the adoption of the old Chinese custom of providing a bell and a box outside the ruler's palace, for suitors seeking justice. The Edict of A. D. 646 says:<sup>cc</sup>

[*Taikwa Edict of A. D. 646.*] "This day a bell and a box were provided in the court. The emperor issued an order saying, 'If there be a complaint, . . . let the chief or the elder first make inquiry and report to Us. If, however, the chief or the elder

五万束梵釋寺六百七十六束修理國所  
四万束

大德園正稅公解各卅万束園分寺新四  
万束藥師寺二万七千束藥新一万束  
龍野園正稅公解各五万束園分寺新五  
千束

信濃園正稅公解各卅万束園分寺新  
四万束藥師寺四万束

上野園正稅公解各五万束公解卅万束園



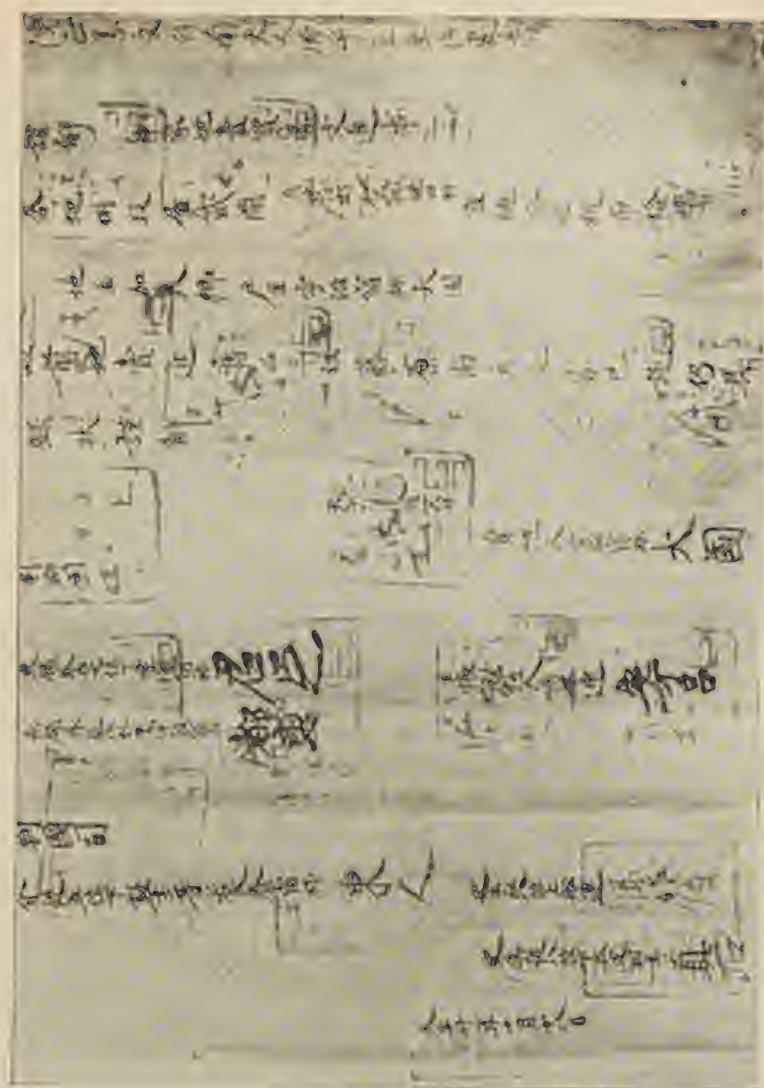
### VIII. Japanese Legal System

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does not come to a clear decision respecting redress, let a document be placed in the box . . . . . The receivers of petitions are commanded to make their report to Us every morning. When We receive this report, We shall draw the attention of the ministers to it, and cause them to consider it, and We trust that this may be done without delay. But if there should be neglect or lack of diligence or bias on the part of the ministers, and thus We should fail to receive the remonstrance, let the complainant strike the bell. This is why the bell and the box are provided.' "

This method of furnishing direct access to the ruler, widely employed in Oriental countries (as noted *ante*, Chap. V, and *post*, Chap. IX), served two purposes. It enabled the common people to seek personal justice from the ruler, by going past the functionaries who surrounded him; and it enabled the ruler himself to keep in direct touch with public opinion, as a guide to legislation and as a check on false advisers at court; the latter being perhaps the more important. In short, as an institution, it was the Oriental counterpart of the much-treasured English right of petition, afterwards rendered obsolete by popular representative government.

(2) The documents of private legal transactions in this period, indicating the development of settled institutions and an incipient system of conveyancing, are copious.<sup>6</sup> They have been well preserved (a remarkable circumstance, for a land of timber buildings, not stone) in the archives of the ancient temple of Shoso-in, at Nara.



VIII. 6—DEED OF SALE OF LAND, A. D. 748

This and the next are among the oldest transactional instruments now extant in Japan

### VIII. Japanese Legal System

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The oldest private instruments in Europe north of Italy, at the monastery of St. Gall in Switzerland, date no further back than the 700's; so that the Japanese records equal them in antiquity.

The following two instruments are among the oldest now extant.<sup>d</sup> The first is a deed of sale of land, dated August, year 28, period Tempyo (A. D. 748):<sup>e</sup>

[*Deed of Land, A. D. 748.*] [Deed reads from U. to M., and is then delivered by the grantee to the temple T., by later memorandum at the top, to transfer title to T.]

"Title-deed of the temple, delivered by the lady Minami to the custodian-priest of the temple [Todaiji]"—

"Respectfully represents the undersigned that he files [in the office of record] the following instrument for the sale of residential land, being one 'tan' in area with two houses, situated at Manda village, Kami county, Uji province. Purchase price ten 'hiki' of raw silk and ten 'tan' of cloth [of quality] payable in taxes. Owner of the land, Uji-no-sukune Okuni, head of household in Kami county. I have duly sold the aforesaid land to the family of the lady Minami Fujiwara, former senior third rank [at court]. I hereby respectfully file the present instrument executed in due form.

"26th day, 8th month, 20th year of Tempyo  
Uji-no-sukune Okuni, Seller.

"Approved by the Office of the County:

Uji-no-sukune Kimitari, Head-official, Outer Senior Seventh Rank Lower.

Uji-no-sukune Toye, Second-official, Outer Junior Eighth Rank Lower.

Imaki-no-muraji Yasumari, Fourth-official, No Rank.

### 3. *Early Conveyancing*

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"Approved by the Office of the Province:

Wakainukai-no-sukune Azumando, Second-official, Junior Fifth Rank Lower, Twelfth Order of Merit.

Fune-no-muraji Tazukuri, Secretary, Senior Eighth Rank Upper.

Otomo-no-suguri Makimi, Secretary, Junior Eighth Rank Lower.

18th day, 10th month, 20th year of Tempyo."

The other instrument represents a money-loan, dating from April, year 4, period Hoki (A. D. 773):<sup>7</sup>

"[*Mortgage-Loan*, A. D. 773.] Respectfully represents the undersigned that he requests a loan of money at monthly interest. Principal sum, three hundred 'mon', interest, five 'mon' [per month]. One lot of residential land is the security, being one 'tan' [in area] with one shingle-roof house, situated at Yamagimi village, Soye-kami province. I promise to repay principal and interest on receipt of my wages. I respectfully file the present instrument executed in due form.

"7th day, 4th month, 4th year of Hoki.

Yamabe-no-chitari.

"Witnesses: Oyake-no-obito Warawako

Hasebe-no-hamatari

Yamabe-no-harima maro

Kon-no-tsukitari

"Joint obligor: Yamabe-no-kimi Iwomaro

[Finger measurement].....[of left index-

Knuckle Joint Joint Tip finger]

"Approval as requested: Katsurai, secretary to Kami-no-Umakai."

[Indorsed later]





### 3. *Early Government*

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"Four hundred and forty 'mon' repaid on 13th day 7th month, being three hundred 'mon' principal, and one hundred and forty 'mon' interest for three months and three days."

(3) The third notable feature of this period was the gradual relegation of the titular ruler (Tenno, or Son of Heaven) to be the symbol of ancestral patriotism and dynastic authority only, through the absorption of power by the civil ministry of the court, concentrated in the hands of a few families. The dominant Confucian doctrine in China had always idealized government by civilians—intellectuals trained in the art of ruling—as against government by crude military force; and this philosophy naturally bred the growth of a group of court bureaucrats. These "mayors of the palace" now in Japan duplicated the course of history taking place at that very moment in France,—though with a very different outcome. In A. D. 645 one Nakatomi Kamatari became the supreme palace minister; "everything", says the old chronicle, "was done according to his counsel"; and for another three centuries his family (later known as Fujiwara), or its branches, continuously ruled in Japan.<sup>s</sup> The Code of A. D. 646 is attributable to his genius; the Taiho Code of A. D. 701 to his son's; and every subsequent revision for three centuries was presided over by one of his descendants—an extraordinary legislative

## VIII. Japanese Legal System

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VIII. 8—FUJIWARA KAMATARI  
Founder of the great legislative family

record for a single family. The great Kamatari himself had served successively under three emperors, dying in A. D. 669; and his son Fubito was prime minister under five emperors, dying in A. D. 720.

But this rule of the intellectuals at the palace in the capital was finally shattered by the growing power of the rich military barons, who had been invested with large fiefs in the newly settled outlying territories. These barons gradually acquired a semi-independence; and their clan-wars fostered rival ambitions which succeeded in supplanting the palace rule. In the 1100's a radical transformation took place. The palace intellectuals lost their power. The national sovereignty was nominally left in the person of the Emperor at Kyoto, the western capital; but the complete political power was now vested in a Regency, based on military feudal tenure, and located in the East at Kamakura. Thus the second period began.

## 4. Feudal Regency

### (II) SECOND PERIOD

4. The first typical figure of this period is Minamoto Yoritomo,<sup>9</sup> who caused himself to be named Military Regent (Shogun) in A. D. 1192. A great administrator, he consolidated the new centralized feudalism at Kamakura, on the east coast; and as a part of his government he created the Monjusho, or Office of Inquiry and Decision, essentially a court of justice.



VIII. 9—YORITOMO, THE FEUDAL ORGANIZER

He was succeeded, in A. D. 1225, by Hojo Yasutoki, a genuine Edward I, who put the new institution on a firm basis. Yasutoki ordained that the first fifteen days of each month be given up to justice; a bell was hung at the portal of the court (according to the old custom); and when a suitor struck it, his petition was at once attended to; judgments were announced on the 10th, 20th and 30th days of the month. After a few years of experience with the new government, a political code was promul-

## VIII. Japanese Legal System

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gated in A. D. 1232,—the celebrated Jo-Yei Shikimoku, or Ordinance of the period Jo-Yei. These were the first laws promulgated in the Japanese syllabic writing (alongside of the Chinese ideographs).<sup>10</sup>

5. This ordinance, in fifty paragraphs, contained the embryo of a new legal growth. Its main purpose was to regulate the new military-feudal regime; and it contained few rules touching private rights. But for the extensive area of the direct possessions of the new Hojo dynasty it established a judicial organization which was destined to be creative of an indigenous Japanese system. For his Supreme Council, now known as Hyojoshu (a name which afterwards—as with the English Privy Council—received a mainly judiciary meaning), the task was to consolidate his rule over the jealous and powerful barons, to maintain law and order, and to afford to all an example of justice in the Regent's own possessions; for (as in the days of Louis XI) the most powerful barons still in their semi-independent domains possessed “the high, the middle, and the low justice” (*post*, Chap. XV).

In this political task, the most significant paragraph of the Ordinance is the final one, prescribing the oath to be taken by the thirteen members of the Supreme Council, to guide their deliberations in the dispensation of justice; it reveals a shrewd foresight of the difficulties that



御成敗式目

自承元年八月十日

一可修理神社專祭祀事

右神者依人之敬增威人者依神之  
德添運然則恒例之祭祀不致陵夷  
如在之禮莫莫令怠慢因茲於關東  
御分國國并庄園者地頭神主等各  
存其趣可致精誠也兼又致有封社



### VIII. Japanese Legal System

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would face the new federated government; and pledges them solemnly, in doing justice, to place dynastic unity before clan separatism:°

[*Oath of the Supreme Council.*] "We swear that questions of right or wrong shall be decided at meetings of the Council [in accordance with these institutes].

"Whereas a simple individual is liable to make mistakes through defect of judgment, even when the mind is unbiased; and besides is led, out of prejudice or partiality, whilst intending to do right, to pronounce a wrong judgment; or again, in cases where there is no clue, considers that proof exists; or being cognizant of the facts and unwilling that another's shortcomings should be exposed, refrains from pronouncing a judgment one way or the other; so that intention and fact are in disaccord and catastrophies afterwards ensue:

"Therefore: in general, at meetings of Council, whenever questions of right or wrong are concerned, there shall be no regard for ties of relationship; there shall be no giving-in to likes or dislikes; but in whatever direction reason pushes and as the inmost thought of the mind leads, without regard for companions or fear of powerful Houses, we shall speak out. Matters of adjudication shall be clearly decided, and whilst not conflicting with justice the judgment shall be a statute of the whole Council in session. If a mistake is made in the matter, it shall be the error of the whole Council acting as one. Even when a decision given in a case is perfectly just, it shall be a constitution of the whole Council in session. If a mistake is made and action taken without good grounds, it shall be the error of the whole Council acting as one. Henceforward therefore, as towards litigants and their supporters, we shall never say, 'Although I personally took the right view of the matter, some or such a one amongst my colleagues of the Council dissented and so caused confusion, etc.' Should utterance be given to any such reports, the solidarity of the Council would be gone, and we should incur the

## 5. *Code of Jo-yei*

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derision of men in after times. Furthermore, again, when suitors having no colour of right on their side fail to obtain a trial of their claim from the Court of the Council and then make an appeal to one of its members, if a writ of endorsement is granted by him it is tantamount to saying that all the rest of the members are wrong. Like as if we were one man shall we maintain judgment.

"Such are the reasons for these articles. If even in a single instance we swerve from them either to bend or to break them, may the gods Bonten, Taishaku, the four great Kings of the Sky, and all the gods great and little, celestial and terrestrial, of the sixty odd provinces of Nippon, and especially the two Gongen of Idzu and Hakone, Mishima, Daimyojin, Hachiman, Daibosatsu and Temman Dai Jizai Tenjin, punish us and all our tribe, connexions and belongings with the punishments of the gods and the punishments of the Buddhas; so may it be!

"Accordingly we swear a solemn oath as above."

This new judiciary institution, with its provincial intermediary judges and intendants, was the model from which all later forms developed. And it gave to the Japanese nation, for nearly a century, the best government it had long known. Law and order reigned; taxes were lightened and impartially assessed; central supervision was diligent; and justice was dispensed promptly and cheaply.

6. But the political equilibrium became again unstable. The Hojo dynasty's court met the same fate as Maximilian's Imperial Chamber in Germany in the 1500's. As time passed, the interned emperors at Kyoto

### *VIII. Japanese Legal System*

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became restless; powerful barons brewed trouble; dual emperors were set up; weak regents lost their hold; and, after the middle of the 1300's, intermittent civil war once more prevailed—this time for nearly three centuries, ending only with the battle of Sekigahara, in A. D. 1600.

#### (III) THIRD PERIOD

7. The first great figure in the third period is that of the victorious Regent, Tokugawa Iyeyasu, in the early 1600's.<sup>11</sup> Under the Tokugawa dynasty of the Regency (A. D. 1603-1868), the nation reached a permanent state of political equilibrium, economic prosperity and social quiet,—comparable to that of France under Louis XIV. Feudal tenures continued, and the military class dominated. But the central federalized government of Tokugawa held unquestioned sway. It now proceeded to close the Japanese islands against all foreign intercourse and the fear of foreign invasion, and provided within its own extensive domains a model of administration for the fiefs of the greater semi-independent barons. The nation henceforth, for nearly three centuries, enjoyed a complete peace, internal and external, unparalleled in any European country.

During that period literature and commerce flourished, and prosperity prevailed. The activities of commerce developed all the expedients and principles of European





VIII. 11—IYEYASU

The great organizer, who enabled Japanese justice to be developed independently for nearly three centuries



## 7. *Tokugawa Regency*

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commercial life. Bills of exchange and banks, the clearing house and the produce-exchange, the promissory note and the check, the insurance-policy and the bill of lading, the chain-store and the trade-guild,—all these features of advanced commercial life are seen reflected in the legal records. Even the clearing-house check, and “future” sales on the rice-exchange, are found. How many of the germs of these devices had been originally imported from China, cannot be told. But at any rate the technique of commerce had developed far beyond that of Athens, the most advanced commercial state of ancient times, and at least on a par with that of the then contemporary Europe.

8. Naturally, the native legal talent for law and order now also found its opportunity for development. This took place under the control and guidance of the Regent's Supreme Council. Iyeyasu obliged the great barons to spend a part of each year under his sight in Yedo, his new capital (now Tokyo); and their castle-like mansions and parked estates were a notable feature of that city.<sup>12</sup> And though the great barons, when at home in their own provinces, were allowed to retain local jurisdiction in legal matters (for they had their own courts, like the English courts baron), yet they were virtually under central control. The Tokugawa Supreme Court at Yedo was given a federal original jurisdiction, for suits between

### *VIII. Japanese Legal System*

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VIII. 12—FEUDAL BARON'S MANSION IN TOKYO

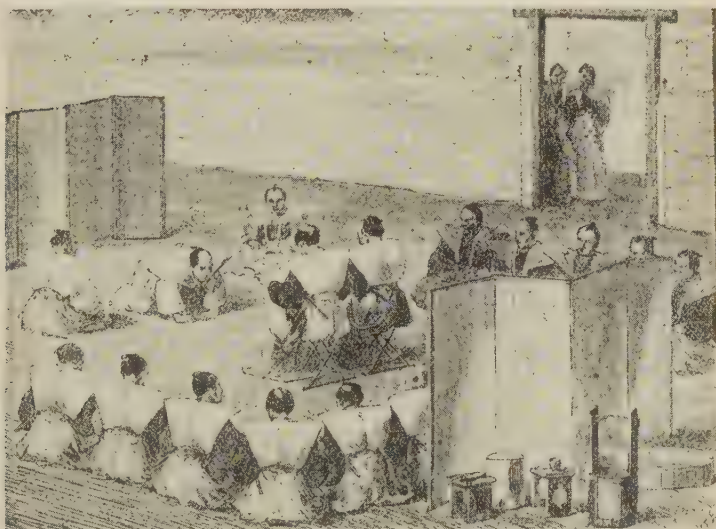
parties from different provinces; a certain confirmatory jurisdiction was reserved for death sentences imposed on a vassal in the baron's court for political offences;<sup>13</sup> the barons' judges, on cases within their own provinces, often consulted the Tokugawa Court with a view to uniformity of law; and "in all matters" (says an edict of A. D. 1635) "the example set by the laws of Yedo is to be followed in all the provinces".

Under this regime, a copious stream of legislation and decision, during three centuries of a legal-minded dynasty, now built up the nation's legal system. Three or four outstanding features may be noticed.

## 9. *Tokugawa Legal System*

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9. In general, the laws and decisions were not publicly promulgated; they were circulated in manuscript for the use of officials only: "Not to be seen by any but the officials concerned", is the rubric at the end of the Code of A. D. 1790. This was perhaps on the Confucian principle that the responsibility of doing justice rests on the ruler, not on the people. "The way to govern the country is to secure the proper men; if there be capable men in office, the country is sure to flourish; if there be not capable men in office, it will go to ruin"; such is the literal quotation from Confucius that forms the closing article



VIII. 13—SENTENCING A NOBLE TO SUICIDE

### *VIII. Japanese Legal System*

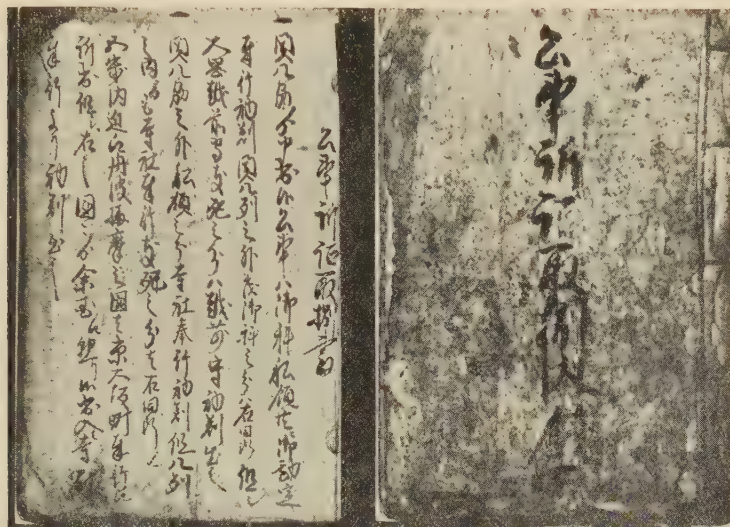
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of the feudal Code of A. D. 1615. Another saying of Confucius was often repeated by the Tokugawa rulers: "Let the people abide by the law, but not be instructed in it". The ideal in the framing of a law was to guide the dull magistrate by its provisions, and to permit the wise magistrate to supplement it with his wisdom. And so the written laws were commands addressed to the officials, and not addressed to the people; therefore not needing to be generally circulated.

But the administration of justice was in the hands of a professional class, and to this class the laws were fully made known. There was a large staff of clerks and assistants for the Supreme Court at Yedo, and also for every one of the local magistrates in the counties, who virtually formed a special trained class with permanent tenure and a system of promotions. They were required to be skilled in the keeping of accounts, to have a general knowledge of civil and criminal law, and to be familiar not only with the customs of their own county but with those of adjacent regions. There were numerous books of instruction for these magistrates—some printed, some copied by hand. They went under various names. "Code of Practice" (*Koji-sosho-tori-sabaki-sho*) is the name borne by a manuscript code dated A. D. 1791—the well-worn 'vade mecum' of some local judge.<sup>14</sup> And there has



## 9. Tokugawa Legal System



VIII. 14—MANUSCRIPT CODE OF PRACTICE, A. D. 1791

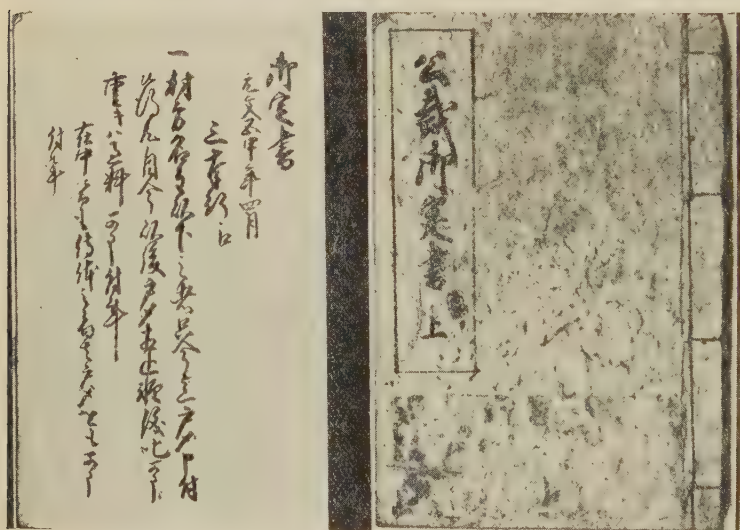
survived doubtless many a “Manual for Trials” (Ko-han-go-tei-sho) in the record-chests of the old county-families.<sup>15</sup>

There were no professional advocates or jurisconsults (as in Greece or among the Mohammedans). Each party was supposed in theory to conduct his own case. To obtain payment of a claim on behalf of another, taking a fee, was unlawful. Nevertheless, many made a practice of thus acting for others, on the pretext of relationship with the party or of his illness and inability to attend; much money was made by such attorneys; but the fee was clandestine.



## VIII. Japanese Legal System

The trial method was identical with the one already developed in China and in continental Europe,—the inquisitorial method, which gives all responsibility to the trial magistrate. Japan was a country of law and order, for its criminal justice was stern and highly organized.<sup>16</sup> The ideal judge of Oriental romance, endowed with piercing penetration into the hearts of litigants and a sturdy sense of equal justice, was a prominent figure, not only in the government, but also in the popular imagination. Oka Tadasuke, Baron Echizen, in the early 1700's comes down to posterity with a fame like Solomon's; there still circulates among the humbler classes of Tokyo



VIII. 15—MANUSCRIPT MANUAL FOR TRIALS (A. D. 1740)



VIII. 18.—AS EXAMINING MAGISTRATE

### VIII. Japanese Legal System

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a popular book containing the sensational stories of his wonderful insight and shrewd justice.<sup>17</sup> One of the anecdotes handed down about him is almost the exact duplicate of Solomon's judgment between the two women who claimed the same child:<sup>4</sup>

[*A Judgment of Oka Tadasuke.*] "About a century and a half ago, a woman who was acting as a servant in the house of a certain Baron had a little girl born to her. Finding it difficult to attend to the child properly while in service, she put it out to nurse in a neighboring village, and paid a fixed sum per month for its maintenance.

"When the child reached the age of ten, the mother, having finished the term of her service, left the Baron's mansion. Being now her own mistress, and naturally wishing to have the child with her, she informed the woman who had it that she wanted the child. But the woman was reluctant to part with her. The child was very intelligent, and the foster-mother thought that she might get some money by hiring her out. So she refused to give her up to the mother. This of course led to a quarrel. The disputants went to law about it; and the case came up before Oka Tadasuke, then Magistrate of Yedo.

"The woman to whom the child had been intrusted asserted that it was her own offspring, and that the other woman was a pretender. Oka saw that the dispute was a difficult one to decide by ordinary methods. So he commanded the women to place the child between them, one to take hold of its right hand and the other of its left, and each to pull with all her might. 'The one who is victorious,' said the Magistrate, 'shall be declared the true mother.' The real mother did not relish this mode of settling the dispute; and though she did as she was bidden and took hold of the child's hand, she did what she could to prevent the child from





VIII. 17—OKA, METROPOLITAN JUDGE OF YEDO  
Traditions of his judicial wisdom have lingered for three centuries



## 9. Tokugawa Legal System

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being hurt, and slackened her hold as soon as the foster-mother began to pull, thus giving her an easy victory. 'There!' said the foster-mother, 'the child, you see, is mine.'

"But Oka interposed: 'You are a deceiver. The real mother, I perceive, is the one who relaxed her grasp on the child, fearing to hurt her. But you thought only of winning in the struggle, and cared nothing for the feelings of the child. You are not the true mother;' and he ordered her to be bound. She immediately confessed her attempt to deceive, and begged for pardon. And the people who looked on said, 'The judgment is indeed founded on a knowledge of human nature.'"

Though the governmental codes were compiled in the form of instructions to officials, it must not be supposed that the laws were secret in any sense. The ordinary trial courts were open to the public. New or standard penal laws were posted on public placards at the cross-roads. The laws of land tenure and family succession were founded on notorious custom. And each village had its own written code of rules for local affairs;<sup>18</sup> this was read aloud by the district magistrate on the first day of each year, and then signed by every householder. It corresponded somewhat to the "keuren" of the Netherlands and the "handfest" and "weistum" of Germany at an earlier period.

10. Another fundamental feature of the system was the principle of conciliation,—the principle so prominent in Chinese justice (*ante*, Chap. IV), and here again (if



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not a general Oriental trait) a result of the Confucian philosophy imported a thousand years before.

The principle of conciliation resulted thus: Every town and village was divided into "kumi", or companies of five neighbors, the members of which (somewhat as in the Saxon frankpledge or frithborg), were mutually responsible for each other's conduct. In case of a disagreement between members of a company, the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. This, they thought, tended to promote good feeling and to make a settlement easier; for everybody knows, they said, that a friendly spirit is more likely to exist under such circumstances. Even family difficulties were sometimes settled in this way. Thus, if a man abused his wife, she might fly to one of the neighbors for protection, and, when the husband came to demand her, the heads of families in the company would meet and consult over the case. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters in their own hands and break off intercourse with him, refusing to recognize him

### *VIII. Japanese Legal System*

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socially; this usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in the larger towns and cities only, where the family unity was somewhat weakened, and not in the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or company. A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. If even the company-chief could not settle the matter, it was laid before the higher village officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of disputes; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman. If the headman was unable to settle a case, it

## 10. Conciliation

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was laid before the local magistrate, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity.

When a case finally came before the magistrate for decision, it passed from the region of arbitration, and became a law-suit. From the magistrate it might pass to the higher courts at Yedo. But even when the case finally came to the magistrate's court, it was not always treated in the strictly legalistic style familiar to us; the spirit of Japanese justice dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

A few selections of actual cases will give a better idea of this conciliatory justice than any number of generalizations. The following documents are from public records, not quite a century old, belonging to a village some eighty miles from Tokyo, lent from the family-chest of an old deputy-magistrate.<sup>s</sup> The first document explains itself:

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### VIII. Japanese Legal System

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[*A Conciliation Case.*] “Bond offered to Haikichi and Tsubei. My son Sutegoro, on the occasion of a festival at the Zoko temple on the 28th of last month, wounded you and your son Tsubei in a quarrel. We are distressed at hearing that you are to take the matter into court, for my son’s punishment would doubtless be severe. We asked Wahei, representative of the farmers of this village, and Tomoyemon, of Hatta village, to mediate and to ask your pardon. We are grateful to you for having extended it, and now promise not to suffer the said son Sutegoro to live in this village hereafter. He has already fled the village, dreading the consequences of his conduct; but if he ever is found again within the village, he shall be treated according to your pleasure: we shall offer no objection to whatever you may do. We offer this document of apology, sealed by the chief of the company and by the mediator.

“Tempo, 11th yr., 8th mo., 3d day [1841].

Farmer Yobei, the parent.

Farmer Sujibei, his relative.

Farmer Isobei, Chief of company.

Wahei, Mediator.

Tomoyemon, Mediator, Chief Farmer.”

The next tale is a longer one; for this case went as far as the magistrate:

[*Another Conciliation Case.*] “*Petition* to Shinomoto Hikojiro, Magistrate of Koma County. The undersigned respectfully represents as follows:—

“Uhei, farmer of this village, has laid the following matter before us. A certain Cho, the daughter of Jirozayemon, farmer in Kiwara village, was a farm-servant in the family of Asayemon, a fellow-villager, during the past year. On the 2d of this month this woman Cho, accompanied by her father, by Yazayemon, farmer of that village, and by Tomoyemon, farmer of this village, came to my house, and made the claim that my son Umakichi should marry

## 10. Conciliation

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her, inasmuch as their previous relations had made it honorable for him to do so. I asked my son if her assertions were true, but he denied it. I told them of my son's denial, and requested these persons to leave the house immediately. But they did not do so; and in my opinion their object was merely to extort money from me by false assertions. On the 4th of this month these persons came again, and threatened me with violence if I did not yield to their demands; but the neighbors intervened, and persuaded them to depart. On the 5th they came again. This time I went with the woman Cho to an inner room, and questioned her sharply, and was convinced that the demand was a trumped-up one. We are watching Cho day and night with four men; for, being a woman, she is more likely to trick us. But all this is very annoying, and I am obliged to beg you to summon these persons and order them to desist. My perturbation of mind incapacitates me from performing my duties as a farmer. I therefore make this respectful request. If you grant it, I shall be forever grateful.

"Tempo, 10th yr., 2d mo. [1840].

Farmer Uhei, Complainant.

Warrantor, Asayemon, Headman of Village.

Countersigned, Ichikawa, Deputy-magistrate of County."

*"Petition for Dismissing a Case.* In the matter of Cho, already reported, we beg to file the following petition for dismissing the case:—

"Cho, daughter of Jirozayemon, farmer of Kiwara village, asserted certain illicit relations with Umakichi, the son of Uhei, in this village; and a demand was made upon Uhei, who reported the matter to your office, and you began to investigate the case. But the affair turns out not to be an important one, and the whole matter has arisen from some foolish statements made by the woman Cho. She has returned to her home, and all the parties are now satisfied with the result. This settlement has been brought about through your influence, and we are very grateful. We beg therefore that you

### VIII. Japanese Legal System

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will shut your eyes to the case, and not give it any further consideration.

“Tempo, 10th yr., 2d mo. [1840].

Ichikawa, Deputy-magistrate.

Farmer Uhei, Complainant.

Headman Asayemon, Warrantor.

Farmer Jirozayemon, Defendant.

Farmer Hichibei, his relative.

Farmer Masabei, his company-chief.

Headman Shirozayemon, Warrantor.”

“*Approved:* Shinomoto Hikojiro, Magistrate of Koma County.”

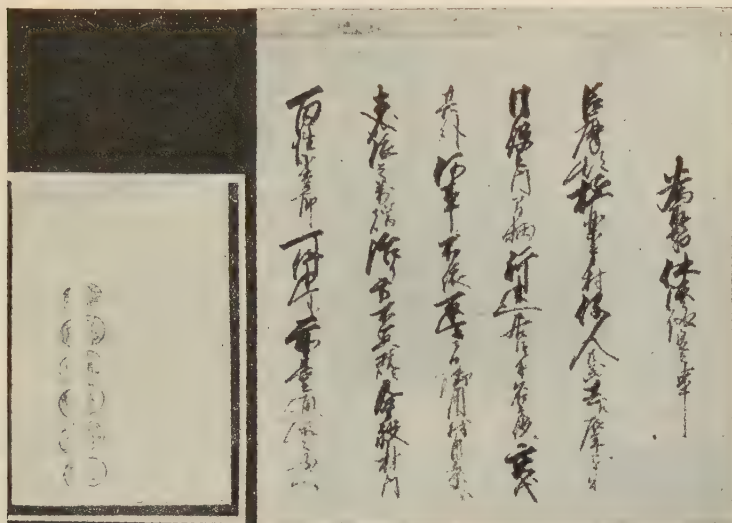
When the controversy was pushed beyond the stage of conciliation and reached the Supreme Court at Yedo, still the principle of conciliation left its marks: for the judicial record was usually completed by the filing of an instrument drafted in the name of the parties, reciting the issues, the facts found, and the terms of the decision, and signed by all the parties in token of their assent to the settlement.<sup>19</sup> The following record, marking the last stage of a long-drawn-out litigation over a rural right of easements and profits, illustrates this method:<sup>h</sup>

[*Record of a Case Appealed.*] “*Lawsuit of Kurohira Village, Kai Province, vs. Ontake Village, same province, over Profits à Prendre.* Anyei, 8th year, 10th month, 21st day [1779].

“Yamamura, Baron Shinano [Exchequer Judge], sitting Judge.

“Kurohira Village in Koma County, Kai Province, under the jurisdiction of Local Magistrate Kubo Heizaburo, brought an action before the said magistrate against Ontake Village, same county and

## 10. Conciliation



VIII. 19—PARTIES' SETTLEMENT-RECORD, A. D. 1779

The seals at the left show a mode of authenticating similar to the English indenture. The counterparts of the instrument are placed edge to edge, folded, and half the seal-mark remains on each

province and under the same jurisdiction, alleging that Kurohira Village was located at Ontake Mountain, that its inhabitants had since time immemorial been accustomed to make a good subsistence from the woodbote and other profits à prendre on the mountain-side; that nevertheless the right of taking wood for buckets and for goldsmith charcoal, included in the aforesaid profits, which Kurohira Village was entitled to take for its own use, was seized by inhabitants of Ontake Village, who prevented passage by the road known as Takashiba Road; and that, since a judgment formerly given on this dispute in the Shotoku period [A. D. 1711-1716] Kurohira Village was greatly suffering for lack of the means of livelihood, and now asked for restoration of its rights under the former custom.

### *VIII. Japanese Legal System*

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"This suit was disposed of by Heizaburo under the usual procedure and referred by him to the Supreme Court together with the documents and his report. By the Supreme Court a summons was then caused to be served upon both parties and the case was examined anew. It was found difficult to give a correct decision on the matter without a view of the land in question. For this purpose, Nakai Seidayu, another local magistrate, was sent to the said land, and he made an inspection thereof. Upon the report of Nakai Seidayu stating the result of such view and survey, a hearing was again had. Now, by instruction of Baron Matsudaira of Ukio [chief judge] the judgment is given as follows:

"In the judgment given on this dispute in the Shotoku period, it is stated that 'branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom'. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is clear that the judgment referred to does not prohibit profits *à prendre* of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits *à prendre* is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along that road bearing any profits *à prendre* in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever. In testimony of obedience to this judgment by both parties, a certificate will be forwarded to this court.

"This judgment will be notified in writing to Ishii Saichiro, clerk of the magistrate Kubo Heizaburo. This case was referred



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here by Kubo Heizaburo through the Exchequer Magistrate; there is therefore no declaration on file in this court.

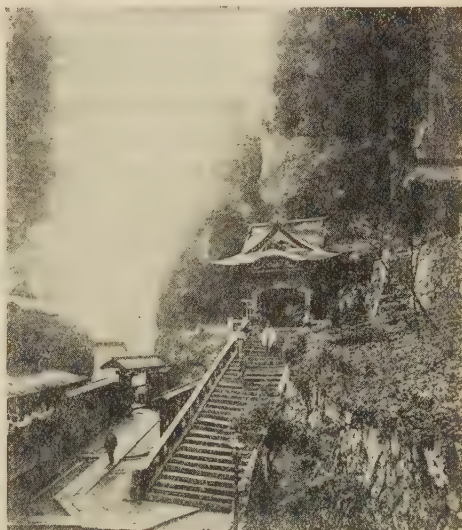
"Attest:

Kamiya Ruhachiro, clerk of the Court".

*"Certificate to the Honorable Supreme Court:*

"1. Our suit came to this honorable court; but owing to the location of the land in question, it could not, without further inquiry, give a correct decision, and Magistrate Nakai Seidayu was sent to the land, and the land was actually surveyed by him. Upon his return of the results of that survey, a new hearing was had.

"2. Kurohira Village as complainant alleged that since many years ago Kurohira Village had been in possession of the eight sections of land on Ontake Mountain and that certain other hillsides had belonged to it,<sup>20</sup> when they were under the jurisdiction of Matsudaira, Baron Kai; moreover, a hot spring commonly called Tonohira Spring had been in its possession; thus there had been many profits à prendre, such as timber for planks and for charcoal and mushrooms, the use of the hot springs, and the clearing of ground for cultivation. Every year, a quantity of mushrooms and a



VIII. 20—HARUNA MOUNTAIN AND TEMPLE

This is a region similar to the one concerned in the lawsuit,—temple lands in a mountain region

### *VIII. Japanese Legal System*

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tax amounting to 3 Kwar and 500 mon in Yeiraku coinage had been presented and paid in to the then holder of the fief. All the said profits were used to be carried away along the Takashiba Road to Kofu, through the Ontake Temple lane, and sold in the market thereof. In the course of the period Hoyei [A. D. 1704-1710] a dispute took place between Kurohira Village and Ontake Village which was finally adjudged by the honorable Supreme Court, a copy of which was indorsed on the back of the map of the land in question. Later on, in the course of the period Shotoku [A. D. 1711-1716] another suit was brought before the same court with respect to the profits à prendre of the same land, in which judgment was given by the court and again indorsed on the back of a new map of the same land. On that occasion, the map containing the terms of the first judgment given in the period Hoyei, and the old registry of land ownership, was surrendered to the honorable Supreme Court, and the lands of the Ontake, Mountain and hot spring above referred to, and other mountain lands individually owned by the farmers, were declared to be temple property. Thus, the old communal rights of Kurohira Village, as well as certain individual titles of its farmers, were lost at one stroke, and the whole community of Kurohira was extremely distressed, so that it was thereafter compelled to seek the profits à prendre of the above description on the land above referred to, for urgent need of want of the means of subsistence, although it did not knowingly act contrary to the judgment given in the period Shotoku. It was truly forced by its extreme necessities to cut down trees, break off branches, and even scrape together leaves, to make the handles of hoes, mallets, etc. All these articles were carried along the Takashiba Road to Kofu, where they were sold to the public. Pursuant to this custom, a group of men of Kurohira Village were passing along the Takashiba Road with the wood for bucket-handles and charcoal, in October, 4th year of Anyei [A. D. 1775] when the watchman of Ontake Village intercepted their passage and seized all their loads, to their great distress. Often before this, the people of Ontake Village had robbed

## 10. Conciliation

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the men of Kurohira Village of the fruits of their labors; the foregoing was only one instance. Since the judgment in the period Shotoku, Kurohira Village has become gradually poorer and more distressed. On the other hand, the people of Ontake Village continue to open new sections for cultivation on the land in question, and they cut down standing trees at their pleasure.

"The plaintiff village further alleged that it was unaware of any ground for Ontake Village's conduct, which appeared to be inconsistent with the law. The plaintiff was in the habit of presenting mushrooms and paying a tax to the owner of the fief in conformity with former custom. Moreover, it prayed the honorable Supreme Court to recognize its rights in the section bounded by the Iwana river on the South, the Muroka meadow and the peak of Hiraiwa on the North, Ara river on the East, and the two peaks of the Ko mountain and of Hishi mountain on the West. The hot spring would thus, it was believed, fall within its territory. Further, as to the profits à prendre, the plaintiff asserted that it was entitled to carry its loads along the Takashiba Road without any obstruction by the people of Ontake Village.

"3. On the part of the defendant village, it was alleged that the judgment of the period Shotoku expressly forbade the villagers of the plaintiff Kurohira to take the aforesaid profits, or pass along the Takashiba Road therewith or to occupy the said sections, and that, therefore, the defendant village had posted watchmen there to watch for travellers. In October, 4th year of Anyei [1775] some men of Kurohira Village came along the Takashiba Road with loads of wood, and the watchman thereupon seized and took from them the wood, within the limits of their right. Defendant, Ontake Village, possesses a tract of land, granted by the government, yielding 240 bushels of rice; the product of which is allotted to the temple staff for the public expenses of Ontake Village. The section of land between the Main Temple Gate and the Upper Temple is temple-land, by the judgment of the period Shotoku, whose terms are in-

### *VIII. Japanese Legal System*

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dorsed on the back of the map. Defendant, Ontake Village, has been duly observing the terms of the judgment. Plaintiff, Kurohira Village, owns one piece of farm-land, 26 bushels yield, located within the limits of the Ontake Mountains. But, in strict point of law, it has no title to any of the forest land therein. It did have, by virtue of the former judgment, the right to enter and take the branches and leaves of trees (as materials for hoes and clubs) and ferns and mushrooms, to be found in the forest lands, and it did so take them. Such forest profits are sufficient for its requirements. Nevertheless, it frequently attempted to exceed these rights contrary to the terms of the former judgment, and proceeded also to take articles not expressly permitted by the former judgment to be taken, and passed with them along the Takashiba Road, along which it was unlawful for Kurohira Village to pass. Thus, in spite of its lack of grounds, Kurohira Village unjustly claims that its people are entitled to use that road.

“As to the plaintiff’s further charge that Ontake Village has unlawfully and surreptitiously cleared certain land for cultivation and cut down standing trees, the defendant Ontake denies any unlawful conduct on its part. What happened was merely that, at the repair of the temple, some standing trees were cut down, to be used only for that purpose, and after request made to the Temple Commissioner for instructions. In no respect has the defendant acted unlawfully.

“4. The claims of neither party in this suit are fully sustained by the honorable Supreme Court. We have now been given the following judgment: ‘In the judgment given on this dispute in the Shotoku period, it is stated that “branches and leaves, materials for handles of hoes and for clubs, ferns and mushrooms, may be taken by Kurohira Village on the mountains and the forest appertaining thereto, according to former custom”. But this passage by no means includes a prohibition to take the materials for handles of buckets, and for manufacture of goldsmith-charcoal. Thus it is



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clear that the judgment referred to does not prohibit profits à prendre of these two sorts. Ontake Village is therefore not to interfere with the taking of such profits by Kurohira Village. But the Takashiba Road is the road by which all carriage of profits à prendre is expressly forbidden by the former judgment just referred to. So that no inhabitants of Kurohira Village are to pass along the road bearing profits à prendre in future. They are to reach their village by the main road, which is accessible from the Main Temple Gate and leads to Kofu. In all respects the former judgment above referred to shall be observed forever.'

"We respectfully acknowledge these honorable orders. In case of our disobedience, we shall be liable to any punishment. In witness of our obedience, we have the honor to file this certificate with the honorable court.

"21st day, 10th month, 8th year of Anyei [1779]

"Plaintiff: Under the jurisdiction of the Local Magistrate Kubo Heizaburo, Kama County, Kai Province;

[Signed] Kurohira Village, by Tozayemon, headman, general representative,  
Rihei, company-chief, general representative,  
Taroyemon, Agent of the farmers.

Under the jurisdiction of the same office, same county, same province;

"Defendant:

[Signed] Ontake Village  
Naito Iki, Chief Elder and Temple Custodian and general representative,  
Kubodera Iyo, general representative."

11. The foregoing two features of Japanese justice were attributable to the borrowed Chinese philosophy of



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life. But a third feature was indigenous, and has its nearest analogy in English legal history. From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's. It is by reason of this achievement of the Tokugawa dynasty that the Japanese legal system is entitled to be regarded as an independent one. A national law has been developed through precedents by a few other peoples also,—by the Hebrews, the Romans, and the Mohammedans; but in those three systems this was done by unofficial jurists, while in the English and the Japanese systems it was done by the official judges themselves.

For understanding the purport of two or three illustrations, the judiciary organization must be briefly sketched. The Regency domain (i. e. apart from the few large self-governing baronies) was divided into three jurisdictions,—metropolitan, rural, and ecclesiastical. To the Metropolitan Judge were brought all suits in which the plaintiff was a townsman; to the Exchequer Judge all suits in which the plaintiff was a countryman; and to the Temple Judge, all suits by a resident of the ecclesiastical lands. These three judges, sitting in banc, formed the Supreme Court. But the judges were not always the

## 11. *Judicial Precedents*

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same persons; because each of these posts was dual, held by two officials, each one of whom in alternate months sat in the Supreme Court (six days in a month.) At other times he officiated in his own jurisdiction. But even here he was more or less an appellate judge, because many or most cases had already been heard by a lower magistrate in each of these jurisdictions; so that there were two possible stages of revision. Original jurisdiction was taken by the Supreme Court in one class of cases only, viz., in suits between parties from different jurisdictions. Otherwise its jurisdiction was appellate only. But an appeal in the strict sense was allowable only on the ground of a denial of justice in the court below—an extreme and rare issue. Instead, however, the revisory function was supplied by frequent voluntary references of cases by the individual member-judges on doubtful points or on subjects calling for a uniform practice.

Such, in rough outline, was the judiciary scheme by which the law was now professionally developed under the Tokugawa dynasty.

The rules of procedure were thoroughly worked out, as befitted an elaborate judiciary system. The following set of rules for the use of maps and plans in land-title disputes will serve to illustrate; it is taken from the Code of A. D. 1742:<sup>1</sup>

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[*Rules of Procedure for Using Maps.*] "Upon the adjudication of boundary disputes the plans prepared by the courts of the boundaries of provinces and of counties shall be certified by the seal of the Council of State and those of the three Judges.

"Other plans embodying the judgment of a court shall be endorsed and certified by the joint seals of all three Judges . . . . .

"In land disputes, the plans of both parties shall be produced; and whether it be the boundaries of a province that are in controversy or merely the boundary of a county, these shall be compared with the government map of the province; and if it be found that in the main there is no discrepancy between them, it shall not be necessary to send a surveyor before delivering judgment. As a rule surveys are not to be too freely ordered, but only in very complicated cases.

"In cases which cannot be decided without the holding of a survey, if the dispute has reference to the boundary of a province or of a county, the government inspectors and the magistrate shall be sent to make the survey. If the dispute relate merely to the boundaries of villages, the magistrate alone is to be sent. And even in disputes as to county boundaries, when the case is free from complications judgment may be given after a survey held by the local magistrate.

"In disputes about rice fields and dry fields and hills and forests and other private rights, when the maps and documents produced by the parties are not sufficiently clear to allow of a decision being given without a rectification of the boundaries, it shall not be necessary to report the case to the Supreme Court for trial, but a subordinate magistrate of the neighborhood is to be sent to carry out a rectification of the boundary."

Formal appeals were comparatively rare. But when the individual member-judge, acting in his own juris-

## 11. *Judicial Precedents*

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diction, was in doubt, he prepared a full statement of the case (much after the manner of an equity judge's findings), and submitted it to the Full Chamber for decision. The following commercial case, readily paralleled in our modern civic life, and raising an interesting question of partnership law, shows the technique of this method of decision:<sup>1</sup>

*[Record of a Decision on a Partnership Claim.]*

"An Action by Kinsuke, of Susaki Village, Musashi province, against Toshichi and another, of Ofune-kuramaye ward, Fukagawa District, Yedo, before Baron Sado.

Dated Kokwa, V (Ape), 2, 4 [March 8, 1848].

- "1. *Consultation* by Kusumi, Baron Sado, Exchequer Judge. Kinsuke, dependent in the household of Sobei, elder of Susaki village, Katsushika county, Bushu province, in the magistracy of Saito Kabei . . . . *Plaintiff*.

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa District, [Yedo] . . . *Defendant*.

Summoned for examination [as witness], Mosuke, renter of the shop of the five-men company, in Shimo ward, Reiganjima, [Yedo].

"The above action was brought before me, a summons issued for the 7th day, and trial had. The plaintiff Kinsuke had formerly lived in Tokoyama-dobo ward, [in Yedo], dealing in sandals. The defendant Toshichi was some years ago in the employment of Heibei, Kinsuke's adoptive father. That Kinsuke had lent certain sums to Toshichi was clear; but the case could not be determined without examining the above Mosuke, renter of the shop of the five-men company, of Shimo ward, Reiganjima, [Yedo], and he was summoned and examined.

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“The plaintiff Kinsuke pleaded as follows:—

“The alleged loan to Toshichi was made under the following circumstances. Toshichi, in the last Dragon year [1844] joined in the contract, long held by Mosuke, for the cleaning of the canal passing under Kyo Bridge, and undertook half of the length to be cleaned, agreeing to contribute to the expense, the total amount of which was to be about 3,237 ‘ryo’. But, his available money not being enough, he informed Kinsuke and requested him to make a loan, showing the indenture executed between himself and Mosuke, and agreeing that payment of principal and interest should be made from the Government-money received from time to time in payment during the progress of the cleaning. The plaintiff then from time to time, beginning with the 12th month of that year, lent various sums to the defendant, sometimes taking an instrument of loan, sometimes getting the defendant’s seal in an account-book. But as the undertaking went on, the expense increased beyond the estimates, and the work began to go more slowly; and finally Mosuke, who had other undertakings of the sort on his hand and was pressed for money, proposed to the plaintiff and the defendant to take up jointly with him the cleaning-contract for the above place, just as the work stood. The plaintiff was informed of this proposal by the defendant, and agreed to it, the arrangement being that those sums which had been lent up to that time to the defendant should, with their interest, be left as they were; and any moneys which might be received [from the Government] for the undertaking should be divided among them without caring for settlement of the loan-account. In the 10th month of the next Serpent year [1845] a new indenture to this effect was made out by all parties, and Toshichi and Kinsuke entered upon the work. Kinsuke might have taken an active part with the others in watching the work, employing laborers, paying wages, etc.; but as the business was unfamiliar to him, he left all to the others. The cleaning went on; but after a time some spots were found where the difficulty of the work un-



## 11. *Judicial Precedents*

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expectedly increased the expense, so that the original estimate of cost was exceeded; and at last the plaintiff and the defendant were obliged to withdraw from the undertaking, and Mosuke proceeded alone with the remainder and ultimately finished it.

“The total amount of the advances made [by Kinsuke] in this undertaking was 1,920 ‘ryo’ 1 ‘bu’ odd, and of this sum 945 ‘ryo’ had been paid, leaving a balance due of 975 ‘ryo’ odd. Toshichi, indeed, had also made some contributions [to the expenses of the joint undertaking before Kinsuke entered], but these were small. It would be unreasonable, were the plaintiff alone to be the sufferer. Toshichi had invariably evaded with profuse apologies his requests for payment, declaring that he was quite willing to pay, but could not until the accounts had been settled with Mosuke; and yet he continually delayed the settlement of that account. The plaintiff himself had borrowed from different quarters the amounts advanced [to Toshichi], and being without excuse for his own creditors, had been obliged to sell even his house and furniture, and had become a dependent in the household of Sobei, a relative, of Susaki village, Musashi, where he now is. The plaintiff therefore demands a detailed account of the payment of all sums due.

“The defendant Toshichi pleaded as follows:—

“He had formerly been employed by Heibei, the adoptive father of Kinsuke. In the preceding Dog year [1838] he had left this position, and had entered the sandal business for himself, hiring the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa. Meanwhile Mosuke, renter of the shop of the five-men company in Shimo ward, Reiganjima, had taken a contract for the cleaning of the canal flowing under Kyo Bridge; but the area to be cleaned was larger than he was able to undertake alone, and in the last Dragon year [1844] he had asked Toshichi to become his partner and undertake half the length to be cleaned. The cost of the whole undertaking was to be 3,237 ‘ryo’ odd. An indenture was drawn up between them, agreeing that whenever the Government-instalments should

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be paid, they should be divided between them. Toshichi thereupon advanced 250 'ryo' odd for the work, and then, not having the money himself, he applied to Kinsuke to furnish further capital. The loans began in the 12th month of the same year, sometimes an instrument of debt being given, sometimes the seal being affixed in an account-book. The agreement was that payment should be made, principal and interest, at each time that a Government-instalment was received. The work of cleaning was begun in the 1st month of the ensuing Serpent year [1845], but it progressed slowly, though several advances of money were made. At this juncture Mosuke, who had taken other contracts of the sort and was pressed for money, proposed that the defendant and Kinsuke should take the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for hire of mud-scows, and take up jointly with him the cleaning-contract for the place already undertaken by Toshichi, just as the work stood. Toshichi informed Kinsuke of the proposal, and, a favorable reply being made, Mosuke gave notice to the authorities and obtained their sanction. The sums already borrowed by Toshichi, with the interest, were to be left as they were, the agreement being that whatever money might be obtained from the undertaking should be divided among the plaintiff, the defendant, and Mosuke. The former having thus become the partners of Mosuke, a new indenture was made out on the 20th of the same month, and the work was entered upon by them.

[Rubric.] "The above instrument was ordered to be produced, and read as follows:

'Indenture.

'Whereas the cleaning of the canal under Kyo Bridge has been undertaken by you, and one of us then agreed to undertake the cleaning of one-half the length, advancing his own share of the expense, and since the work has been begun and during its progress the Government-money has not been sufficient and large amounts of money have been spent; now

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therefore it is agreed between all parties that we shall receive the remainder of the Government-money, 782 'ryo', pay 50 'ryo' due for the hire of mud-scows, and undertake the cleaning of the portion now remaining, and carry it on until completed and officially inspected; that we shall pay the wages of the bargemen, the expense of official inspectors' sheds and laborers' sheds, fees of superintendents, laborers' wages, etc., and shall make every effort to guard against delay; that we shall have no responsibility in regard to the two special places [left to your charge]; that on request we shall deliver to you your share of any extra payments [of the Government-money] which we may obtain for specially difficult portions; and that you shall leave the pumps, scaffolding, and other apparatus just as they now are, the same to be restored to you on completion of the work. Acting under the agreement thus privately made between us, we shall complete the cleaning not later than the last day of the ensuing 11th month, putting on a sufficient number of men and boats; and if this proves impossible we shall endeavor to cause as little inconvenience as may be. In testimony of this we hereby exchange instruments of the above effect.

'Kokwa, II [Serpent], 10, 20 [Nov. 19, 1845].

Toshichi, renter of the shop of Kinjiro, in Ofune-kuramaye ward, Fukagawa.

Kinsuke, land-renter of Jutaro, in Tokoyama-dobo ward. To Mosuke, Esq.'

"The above instrument being drawn up, the plaintiff and the defendant became the partners of Mosuke. But in a short time difficult portions were found in the area to be cleaned, and the cost increased largely, until the amounts paid in by Kinsuke by the 11th month of that year amounted to 1,920 'ryo', 1 'bu'; for the slowness of the work made it difficult to estimate the total cost of any portion

### *VIII. Japanese Legal System*

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beforehand. Moreover, as the time for completion named in the contract had now expired, the two [Kinsuke and Toshichi] were obliged to give up the undertaking, the remainder of the work being undertaken and ultimately completed by Mosuke. Of the above 1,920 'ryo', 1 'bu', 945 'ryo' in all has since been paid at various times to Kinsuke, and the amount left unpaid is 975 'ryo', 1 'bu'. The above facts are admitted. But [there are reasons why the payment of this remainder should not be enforced]. Now that the plaintiff and defendant, after entering into the above contract and making out a new instrument in which they appeared as partners [of Mosuke] (who appears to have taken advantage of their inexperience in such matters and knowingly included the most difficult places in the portion assigned to them), have given up the undertaking on account of their miscalculation of the expense, it is difficult to see why Kinsuke should make the claim that he does. Of course the defendant occupies the position of a former servant of Kinsuke, and does not wish to appear guilty of a breach of the duty of devotion arising from that relation; but as his account with Mosuke is still unsettled, it is impossible for him yet to settle the claim of the plaintiff.

"Mosuke's statements were as follows: . . . [here his testimony is fully analyzed by the judge.]

"[Findings]: Such were the statements of the parties, [and the court has reached the following conclusions]: It is clear that the plaintiff had lent various sums to Toshichi, taking sometimes an instrument of loan, sometimes the defendant's seal in an account-book. But when the new instrument was drawn up, by which both parties became the partners of Mosuke, and [it was stipulated that] these advances should be left as they were, and that any money which might be received by them from the government for the undertaking should be divided among them on its completion, without caring for any settlement in regard to the above advances, this claim for the advances became merely a partner's contribution sub-

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ject to the risk of profit and loss, and was no longer to be regarded as a debt due from one to the other.

"The parties declare that they have no fault to find with the proceedings as related above.

"Trial was held as above related. The parties disagree as to the validity of the claim, but it seems to me that the matter is one of profit and loss, and that the judgment should be that no order of payment should be made. I therefore consult you on the subject.

"Year of the Ape, 2nd month."

### "2. *Judgment by the Full Chamber.*

"Kokwa, V (Ape), 2, 4 [March 8, 1848].

Before the Baron Sado, Exchequer Judge.

"An action having been brought by Kinsuke, of Musashi province, Katsushika county, Susaki village, in the district of Magistrate Saito Kabei, for arrears of a money loan of 975 'ryo', 1 'bu' odd, alleged to be due from Toshichi, renter of the shop of Kinjiro, of Fukagawa, Ofune-kuramaye ward, [the defendant, was summoned by a 7-day indorsement and trial was had. The judgment is that no further trial shall be had. It is plain that the plaintiff lent the above sum to the defendant, partly on instruments of loan, partly in the shape of book-debts. But when the new instrument was drawn up and the partnership was formed with Mosuke, renter of the five-men-company's shop in Reiganjima, Shimo ward, for the cleaning of the canal, the loan was left as it was, the parties agreeing that whatever moneys might be received for the cleaning upon its completion should be divided among them, and that no further account should be taken of the loan in question, the advances thus becoming a partnership risk of profit and loss. The parties should be directed to hand up an instrument (of submission).

"Note, that as the case was brought up by the Exchequer Judge, there is no complaint on file."



### VIII. Japanese Legal System

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The development of an independent system by case-law is amply revealed in the records of these two hundred and fifty years of Tokugawa precedents. Throughout that period of records, there is found not a single citation of a Chinese or any other foreign law-book, but only of Japanese laws and precedents,—a feature not true of any European people (except the Keltic) since Roman times. The underlying political philosophy was in origin Chinese; but the Tokugawa technique was Japanese. The system was self-developed.

In the following two typical cases, one judge consults another about a pending case; is answered by an opinion citing precedents, drawing a distinction and reserving the distinguished case for future decision; and then, a few months later, the distinguished case comes up on the calendar and the Full Chamber decides it,—all in the best traditional spirit of English case-law<sup>k</sup>. It will be noted that the search for precedents ranged back nearly a century:

[*Supreme Court Opinions on the Survival of a Money-Claim.*]  
“Payment by a Debtor who has suffered Local Exile.

“Dated Bunsei, X, 11, 2 and 18 [December 19, 1826, and January 4, 1828].

“1. *Consultation by Sakakibara, Metropolitan Judge of Yedo.*

“Ought not the successor, if any, of a person who has suffered local exile, to undertake the debts of his predecessor, provided no

## 11. *Judicial Precedents*

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forfeiture of cultivated and residence land and of other property was made?"

"2. *Answer by Ishikawa, Exchequer Judge.*

"We acknowledge the receipt of your inquiry. We understand you to refer to the case where the defendant suffers local banishment, and we searched for precedents on that point, but found none. We discovered, however, a case where this court was asked, in Gembun, IV, 10 [November, 1739], whether a claim for money lent by one who was afterward sentenced to local exile was subject to extinguishment, in which a negative answer was given, although the contrary rule would apply if a confiscation of patrimony had accompanied the sentence, for this would include the money loan. A sentence of local exile has nothing to do with wife or son, so that the wife or the son may take the cultivated and residence land and other property, or, if there be none, the exile may be given the proceeds of a sale of the property. Now, as even the claim of an exiled creditor is not extinguished, much less should the liability of such a debtor. In the latter case, the name of the debtor's successor, if any, should be substituted by the court in the order for payment; and even if there is no successor, the court should revise the instrument (if confiscation has not occurred), as soon as the debtor has fixed his residence, and deliver it to him, ordering payment without fail. But in Kwansei, VI [1794], the defendant in a suit pending before your predecessor, Ikeda, Baron Chikugo, absconded, and the Full Chamber decided (there being no precedent in which the wife or son had under those circumstances been ordered to be substituted in the order for payment) that in the future in such cases no substitution should be ordered, but the order for payment should be annulled. According to this it would seem proper in the present case to annul the order for payment. Yet if such a rule be established, it would not be just, in our opinion. In ordinary actions on money loans, we have customarily allowed the plaintiff to name the successor as defendant, where [the debtor has died and] a successor is in

## *VIII. Japanese Legal System*

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existence; and so in case of a pending action, when the absconder's successor is determined, it is but just to have his name substituted, and deliver it to him and order payment.

"If you agree with these views, we trust that you will lay the matter before the Full Chamber, so that our practice for the future may be determined.

"11th month"

"3. *Letter from Ishikawa to Sakakibara.*

Bunsei, XI, 1, 28 [March 13, 1828].

"You consulted us in the 11th month of last year as to the case of a debtor who has suffered local exile. We answered that we hoped to see a rule fixed for the future, not for that case only, but also for that of a debtor absconding pending action brought, and requested you to lay the matter before the Full Chamber, if agreeable. We shall be glad to hear your views on this subject, and beg to ask your advice."

"4. *Answer by Sakakibara.*

Bunsei, XI, 2.

"I consulted you, as you say, in regard to local exiles' debts, and your answer suggested that payment should be ordered, which in fact accorded with my own view, and I made order accordingly. You also noted the case of a debtor absconding pending an action before my predecessor, Ikeda, Lord of Chikugo, in which the Full Chamber decided not to order a substitution of wife or son, which seemed to require me in this case to annul the order of payment; and suggested that such a general rule would be productive of injustice, and that where a successor has been determined, we should order him to pay; and proposed a reference to the Full Chamber. But what I consulted you about was not the case of a debtor absconding pending action brought, but a first-seal case [that is, a case where the defendant is out of the jurisdiction of the Lower Court (in this

## 11. *Judicial Precedents*

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case by banishment), and the case must be sent to the Full Chamber for trial]; and we were both agreed, as to this case, that payment should be ordered, and I did so order. So that as to this point no reference to the Chamber seems to be required. As to the other case you spoke of, I am myself not yet decided, and I think it more suitable to consult the Full Chamber when the occasion calls for it."

This particular question, here left undecided, came up a few months thereafter; as the next precedent shows:

*[Supreme Court Opinion on a Successor's Liability.]*

"Dated Bunsei, XI, 4, 2 [May 15, 1828].

"1. *Inquiry by Saga, Baron Bugo, and Ishikawa, Imperial Steward, Exchequer Judges.*

"In cases where the defendant in an action for money lent or unpaid purchase-money has absconded, we have hitherto thought that we should not entertain the complaint, where the creditor sues the successor, because the whereabouts of the debtor may eventually be discovered and he may then be sued. This practice of refusing in such cases originated perhaps in the idea that, even though a so-called successor exists, either there has been no determination that he has in fact become the successor, or else, as sometimes happens, his house is extinct and one of his relatives assumes his estate. Moreover, the disappearance has taken place because of the debtor's adverse circumstances; so it seems doubtful whether a suit against the successor, supposing there were one, would be of any avail. In those cases where a debtor has died [pending suit], and his widow has succeeded him, we have been accustomed to order the suit to be reinstituted against her, describing her in the complaint as 'Haru, widow of Taro,' and alleging that a sum of money lent to the husband in his lifetime is due and unpaid. We have also made some investigations as to proceedings in similar actions against villagers.

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In the last year of the Hare [1819], when Ishikawa, Imperial Steward, and Toyama, Palace Warden, were Lawsuit Judges in the Exchequer Department, there were a number of actions on money loans in which the creditor, because the debtor had died or was otherwise unavailable and had left no estate, was suing the surety. It was thought by the court that the clause of the instrument 'If the principal shall be in arrears, etc.,' signified only the case where the principal, in his lifetime, utterly fails to pay the debt; so that where the principal had merely absconded, and no successor exists, the creditor should wait until the whereabouts of the debtor was discovered [and then sue him]; and that therefore suits against the surety should thenceforth be entertained, the principal having absconded, only when the clause read 'If payment by the principal is in any way hindered, payment shall be made by the surety,' and not otherwise, even where the principal had died. The matter was referred to the Full Chamber, and they came to the following conclusion: 'Generally, when a debt is secured by the addition of a surety's name, the purpose of having a surety is that he shall attend to the debt if payment is not made; so that the addition of a surety is to no purpose if the court declines to order payment merely because there is no clause expressing the undertaking of the surety. The obligation of a surety, of course, lasts only during his lifetime [and does not descend to his successor], while that of a principal debtor who dies or absconds survives against his son, grandson, etc., if there be any patrimony inherited. But when a debtor leaves no such successor, the court should order payment by the surety, if, after examining the circumstances under which he became surety, it considers that he ought to be regarded as liable,—and this in spite of the absence of any clause expressly undertaking liability. In answer to the argument that we ought not to hold him liable without such a clause, it may be said that, if we should refuse [creditors would be loath to lend], the money circulation would diminish, and undesirable results would follow. It appears better to order payment by the surety without distinguishing between the clauses "If



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the principal shall be in arrears, etc.," and "If the principal's payment is in any way hindered."

"Such was the decision of the Full Chamber. In the present case, too, we think that it would be unjust if the creditor could not sue the successor, even though the debtor's non-payment is owing merely to his having absconded. However, if on this principle we decided that a relative who assumes charge of the estate and acts on behalf of the debtor in his business or in his cultivation is liable for all the debts of the fugitive as 'undertaker of the estate', then nobody would ever be found to perform such offices, and the result would be many waste estates. In such a case, therefore, the rule should be as hitherto, that the mere undertaker is not to be charged with debts. But henceforth, when a suit is brought by the creditor against the son or other alleged successor to the estate of the fugitive, the plaintiff should consult with the officers of the defendant's village, and obtain from them a certificate of identity of the defendant, bearing the names and seals of the village officers and certifying that the defendant has succeeded to the estate of the fugitive; and if the plaintiff can show such a document, he may go on with his suit.

"We think that the rule should be thus, and [we have the less hesitation in coming to this conclusion because] there can be no objection, since the order of the last year of the Horse [1822] respecting money loans, unpaid purchase-money, etc., on the part of village officers, to forwarding the necessary certificate of identity.

"We therefore make the above proposal. 4th month.

### 2. *Decision of the Supreme Court Full Chamber.*

"Decided in accordance with the proposal, Bunsei, XI, 4, 2, [May 15, 1828]."

The Tokugawa legal system, thus developed by native genius, might in the local course of events have produced

## *VIII. Japanese Legal System*

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more distinctive fruits of independence. But at this juncture international history diverted its destiny.

### (IV) FOURTH PERIOD

12. In 1853 the long international seclusion of Japan was broken. Commodore Perry came with his American fleet, and demanded rights of trading. Other nations followed. In these treaties the Japanese gladly conceded to the foreign nations the power and duty of extra-territoriality, i. e. jurisdiction over the foreign nationals, as the price for refusing general rights of settlement throughout the land. Meanwhile the powerful semi-independent barons seized the opportunity to rebel, denouncing the Regency for its subservience to the foreign nations. By the revolution of 1868, the political government shifted back, after seven centuries, from the Regency to the Emperor.

Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation's talent devoted itself for the next thirty years.

This task accomplished, the national pride now became restive under the concession of extra-territoriality. In demonstration of its right to resume complete sovereignty over national justice, the Government undertook to re-

## 12. *Juristic Revolution*

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make the form of its law on Occidental models. In 1889 came the written constitution; Count Ito,<sup>22</sup> its inspirer and draftsman, ranks as Japan's greatest statesman of the last generation. The most able younger minds were sent abroad to master the Occidental systems of government and law. During the 1880's and 1890's, in Tokyo, thousands of aspirants in Tokyo schools studied the laws of France, Germany, and Anglo-



VIII. 22—COUNT ITO HIROBUMI  
Framer of the Imperial Constitution  
of 1889

America,—at first under imported law teachers, afterwards under the returned Japanese jurists bearing Occidental degrees.<sup>23</sup> Meanwhile, five new codes were prepared,—first drafted by jurists imported from France and Germany; then re-cast, in contents better adapted to Japanese institutions, by the new generation of Japanese jurists trained in the Occidental laws. These went into force in the last decade of the century. In the next decade, foreign extra-territoriality was relinquished.



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VIII. 23—MODERN LAW PROFESSORS



## 12. *Juristic Revolution*

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VIII. 24—MODERN SUPREME COURT BUILDING

From what has been sketched of the Tokugawa institutions of the third period, it is easy to see that the task, in these new codes, was not to create a legal system, but to revise an existing one. But the officials of the old Regency had politically disappeared; and there existed no body of professional juristic literature available for educating the new generation and for supplying the technical legal phraseology. Moreover, foreign expectations had to be satisfied. Hence, in framing the new codes, resort was had to the compact scientific materials of the Romanesque system from the continent of Europe.

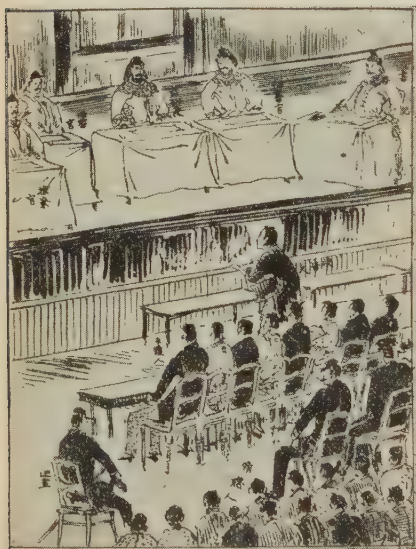


## VIII. Japanese Legal System

The law was re-stated on the classification of the Romanesque law; the new legal language being constructed from the Chinese etymology; for Chinese literature had been to Japan what Latin had been to Germanic Europe.

The Supreme Court,<sup>24</sup> for example, was now called "Tai-shin-in", Supreme Judicial Office, instead of "Hyo-jo-sho", or Chamber of Decisions; and the Code of Civil Procedure was termed "Minji Soshoho Seikai", instead of "Kori-sosho-tori-sabaki-sho". Criminal trials were conducted in court-rooms furnished on the Occidental

model; and the bailiffs and police, though gentry ("samurai") by descent, everyone of them, now wore Occidental uniforms.<sup>25</sup> The external modes of the West have been adapted by the native spirit of Japan to form a new composite whole.



VIII. 25—MODERN CRIMINAL COURT-ROOM

This reorganization of the ancient native institutions to suit the times, welding together





VIII. 26—FUJI MOUNTAIN

## 12. *Juristic Revolution*

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West and East, signified hardly a new legal system, but the re-making of an old one, by a process with which Northern Europe was already long familiar, when Roman law was welded with Germanic law (*post*, Chap. XV). Japan was the first Oriental country to undertake it voluntarily. But it is this same process that is being repeated, in a later generation, in Siam, in China, in Turkey, in Persia; and in those also it has come as a 'quid pro quo' for the relinquishment of extra-territoriality and as a symbol of external assimilation between Orient and Occident.

To future historians must be left the analysis of the future result. The old Japanese artists, in their masterly woodcuts, were fond of depicting the celebrated mountain Fuji, one of the nation's (and the world's) scenic gems. The art of the modern photographer, too, may present it to us in another guise. The impressions are different. But the mountain is the same.<sup>26</sup>

## VIII. Japanese Legal System

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1. *Map of Japan*. From the map in *Ernest W. Clement and R. Hildreth*, "Japan As it Was and Is", vol. I, p. 272 (Chicago, McClurg, 1906).
2. *Buddhist Temple Tower of Ikegami*. From a photograph by *K. Kimbei*, Yokohama.
3. *Shotoku Taishi*. From a photograph, procured for the author by Professor *Kenzo Takayanagi*, of the Imperial University at Tokyo, of a painting, variously attributed, but dating from about A. D. 720; formerly preserved in the Horiuji Temple, but now in the Imperial Household Collection. The two figures at the side are supposed to be the sons of the Prince.
4. *Seventeen Laws MS*. From a photograph, procured by Professor *Takayanagi*, of a MS. of about A. D. 900, in the Iwasaki Library, Tokyo. An older MS., attributed to the Prince himself, is preserved in the archives at Nara.
5. *Konin Code MS*. From a photograph, procured by Professor *Takayanagi*, of a fragmentary palimpsest MS. (from the original 40 volumes), recently discovered in the archives of Prince Michizane Kujo, on a MS. text of the *Engishiki*, a code of about A. D. 900.
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13. *Sentencing a Noble*. From the illustration in *Humbert* (cited *supra*), p. 377.
- 14, 15. *MS. Books of Practice*. From MSS. in the Elbert H. Gary Law Library of Northwestern University.
16. *An Examining Magistrate*. From the illustration in *J. E. DeBecker*, "Saved by the Judge; a Story of the Ancient Japanese Courts" (Yokohama, Gazette Press, 1906).
17. *Oka, Metropolitan Judge of Yedo*. From the frontispiece in "Oka Meiyō Seidan" (Famous Judgments of Oka; Tokyo, n. d.).
18. *Village Code*. From a MS. in the Elbert H. Gary Library of Law.
19. *Parties' Settlement-Record*. From a MS. in the Elbert H. Gary Library of Law.
20. *Haruna Mountain and Temple*. From a photograph by *K. Kimbei*, Yokohama.
22. *Count Ito*. From the illustration in *E. W. Clement*, "Handbook of Modern Japan", p. 138 (Chicago, McClurg, 1908).
23. *Modern Law Professors*. From portraits in *J. H. Wigmore*, "Legal Education in Modern Japan" (cited *infra*), pp. 21, 25, 29, 31.
24. *Modern Supreme Court Building*. From the illustration in *Clement* (cited *supra*), p. 164.
25. *Modern Criminal Court-Room*. From *Shintaro Fujita*, "Tokugawa Baku-fu Keiji Zufujo", "Descriptive Pictures of Criminal Punishments under the Tokugawa Regency," a book of illustrations by Japanese artists, No. 58 (Tokyo, N. Kobe, 1892), in the Elbert H. Gary Law Library.
26. *Fuji Mountain*. (a) From a woodcut by *Kwazan*, reproduced in "Shimbi Shoin" (Album of Old Masters, Tokyo, 1924); (b) from a photograph by *K. Kimbei*, Yokohama, 1892.

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- e. Oath of the Supreme Council. From the translation in *J. C. Hall*, "Institutes of Judicature" (cited *infra*), p. 42.

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- f. Oka's Judgment. From the translation in *J. H. Wigmore*, "Legal System of Old Japan" (cited *infra*). The same expedient is chronicled in Chinese and other Oriental annals: *T. W. Rhys-David*, "Buddhist Birth-Stories" (new ed. 1925), pp. xv, xlii; Sir *J. G. Frazer*, "Folklore in the Old Testament" (London, 1918), vol. II, chap. XI, p. 570. *F. W. Farrar*, "The First Book of Kings" (New York, 1903, The Expositors Bible Series), Ch. XXII, p. 128. *Moncure D. Conway*, "Solomon and Solomonic Literature" (Chicago, 1899), Ch. II, p. 12.

By courtesy of Mr. P. G. Sayeki, professor of archaeology in the Tokyo Imperial University, is furnished the citation of an anecdote almost exactly similar to Solomon's judgment, but attributed to Hoan Po, governor of the Chinese province of Yin-chuan; the anecdote is found in a Chinese book of 148 decisions, dating A. D. 1411, by *Kuei Wan-yung*, revised by *Wu No*, in A. D. 1420, and re-published in Japan in A. D. 1692, by Saikaku, under the title "O-in-hi-ji"; the original Chinese book bore the title "T'ang-yin-pi-shi", or in Japanese pronunciation "To-in-hi-ji", meaning "Cases decided [while sitting] in the shadow of an apple-tree". A translation of the anecdote, by Professor Sayeki, was printed in the Illinois Law Review, vol. XXX.

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| Vols. XXXIV, Part I, XXXVI, Part II, | <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;">{</div> <div style="display: inline-block; vertical-align: middle;">J. C. Hall, "Japanese Feudal Law:</div> </div>                                                         |
| XXXVIII, Part IV, XLI, Part V        |                                                                                                                                                                                                                                                                                                     |
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THE  
MOHAMMEDAN  
LEGAL SYSTEM





## IX

### *The Mohammedan Legal System*

#### *(I) Origin and Spread of Islam*

Arabia awakened by Mohammed—Mecca—Islam an all-inclusive system of life—Spread of Islam—Leadership in science and arts—Cordoba, the finest capital in Europe—Decline of Islam—Stages of its legal history.

#### *(II) Civil Justice*

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2. The Koran.
3. Sayings and Acts of Mohammed—Sayings on the law of succession.
4. The commentators—Zaid Ibn Ali—Sidi Khalil's Code, on sales, bankruptcy, partnership—Opinions on legal cases—Theoretic treatises.
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8. Legal Education—Harun-ar-Rashid—Colleges.
9. Example of a lawsuit-record in A. D. 1916.

#### *(III) Criminal Justice*

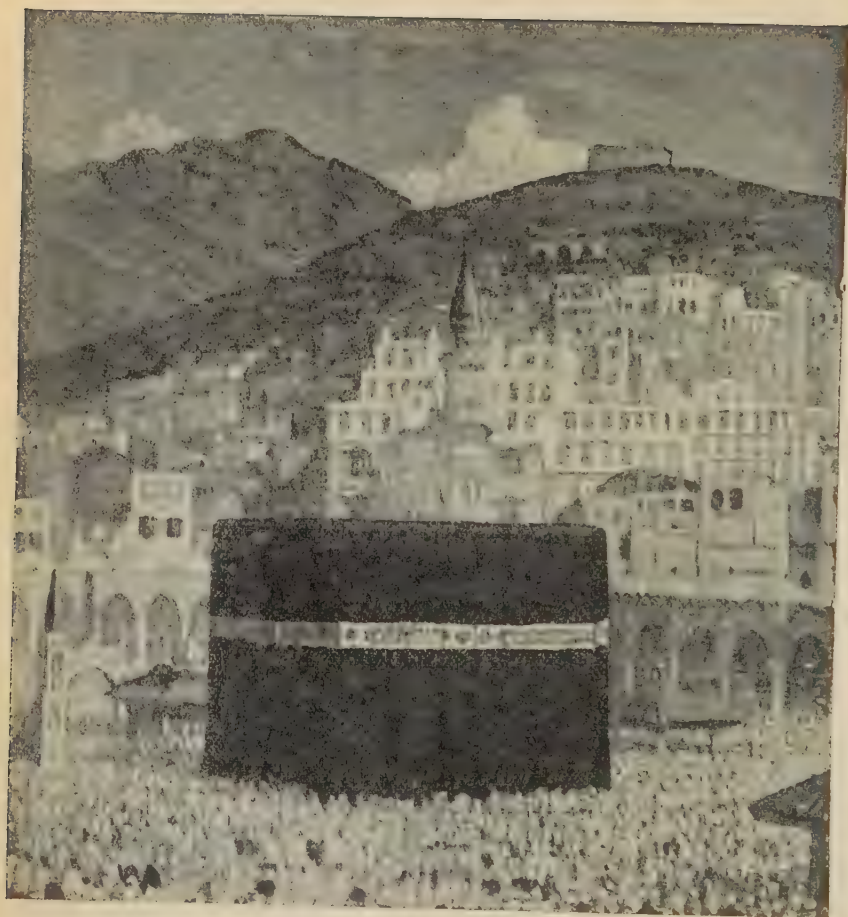
10. The Divan, or personal justice of the ruler.
11. Justice in Arabia—Judge in Libya—Courts in Nigeria—Sultan of Ruanda—Justice in Annam, Persia, Afghanistan, Ethiopia.
12. Modern Turkey and Persia—Occidentalization of the law—Conservation of racial ideas.

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IX. 1—MAP OF ARABIA





IX. 3—MECCA



## IX

# The Mohammedan Legal System

### (I) ORIGIN AND SPREAD OF ISLAM



THE term "Mohammedanism" is not used by its believers. The correct term for that faith is "Islam," meaning "submission to the one God."

Islam today represents one of the three great world-systems of law. But it began in a backward and unpromising region of the earth,—in Arabia.<sup>1</sup> The northern end of this region had once, long before, been the great commercial crossroads of the ancient world, between Egypt, Assyria, and the Orient. And in Mohammed's day, about A. D. 600, Arabia was again on the main path of commerce, this time by sea, from India. The Arabs were as yet one of the crudest and least developed branches of the Semitic race. They possessed as yet scanty literature of their own. But with their vigorous propagandism, their fighting talents, and their intellectual receptiveness, they were destined to play a part in history comparable only to the Roman and the Germanic races. Under the new faith, mosques and minarets arose in every region.

Mohammed's creed represented, for the Arabs, the moral and monotheistic reform of an idolatrous people. Spiritually, it did in its day and place very much what

## *IX. Mohammedan Legal System*

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early Christianity and Buddhism had done in their day and place. Its founder touched the heart of the multitude with his creed as only two other characters have done in the world's history.<sup>2</sup> Beginning with a protest against orthodox Arab beliefs, Mohammed was at first persecuted, like the prophets of other new faiths; so he and his followers seceded to Medina, the city thenceforward revered for his memory, where now two hundred thousand pilgrims come annually to renew their devotion. But after the rapid success of the new faith in converting the entire Arab people, its headquarters were trans-

ferred to Mecca, the ages-old centre of Arab traditions.



IX. 2—AN ARAB LEADER

In Mecca was located the Kaaba, a square temple said to have been built by Adam and rebuilt by Abraham.<sup>3</sup> One of its sacred stones was brought down from heaven by the angel Gabriel; for the religion of Islam frankly accepted the Hebrew traditions of reverence for Moses and Abraham, as well as the mission

## *Spread of Islam*

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of Jesus of Nazareth; and Mohammed claimed no more than to be their successor as a new apostle of the one God.

By Mohammed's day, Judaism had long been disintegrated and scattered. The Christian Church also was at its lowest stage; it was hamstrung by the irresistible invasions of the pagan Germanic tribes from the North; it was torn into numberless rival sects by petty doctrinal dissensions; and it was disliked for its rabid persecutions and the scandalous corrupt effeteness of many of its princes and bishops. Islam had the great advantage, over the Christianity of that era, of being a precise, complete, simple, and practicable plan of life. Everything that a Moslem should believe and should do was laid down in the authoritative summaries made, after Mohammed's death, from the book of his sayings and writings. Not only did these didactics cover theology, morals, law, politics, and industry; they were also practicable, making little demand for sacrifice and self-discipline. The Christianity of the New Testament offers a sacrificial ideal that eternally endures in its attraction, despite perpetual failure to live up to it. No society has yet achieved a success in living up to Christianity. But Islam was a success from the start, in scarcely more than a generation.

And so the simple and satisfying creed of Mohammed, carried in holy wars by the zeal and the arms of a young

## *IX. Mohammedan Legal System*

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and freshly inspired people, spread rapidly, eastward and westward. Within little more than a century after Mohammed's death it had reached as far east as India and as far west as Spain.<sup>4</sup> The Arabic language now gradually superseded Greek and Latin, in becoming the vehicle of education and commerce through all the regions west of the Himalayas and along the Mediterranean. The Khalifs were the most potent monarchs of the globe.

The centre of the new empire and religion was at first Damascus in Syria, then Bagdad in Mesopotamia. But later several independent centres developed, in Persia, Egypt, and Spain. At the extreme east in Persia, the throne-rooms and gardens of the Shahs, at Isfahan and at Tehran, still testify to the saying that the march of Islam can always be traced by the Saracen architecture. The climax of its style was first reached in Spain; and at Granada the Alhambra, with its Hall of Justice and its Gate of Justice,<sup>5</sup> has long been renowned for the glorious traditions of Saracen architecture. But Cordoba and Seville, in the palmy days of the 900's, were the centres of western Islamic civilization.

It must be remembered, to appreciate the achievements of the Muslim legal system, that in those four centuries from A. D. 800 to 1200, often called the Dark Ages of Christian Europe, the Arabs or Saracens were



IX. 4—MAP OF ISLAMIC REGIONS, A. D. 900



## IX. Mohammedan Legal System

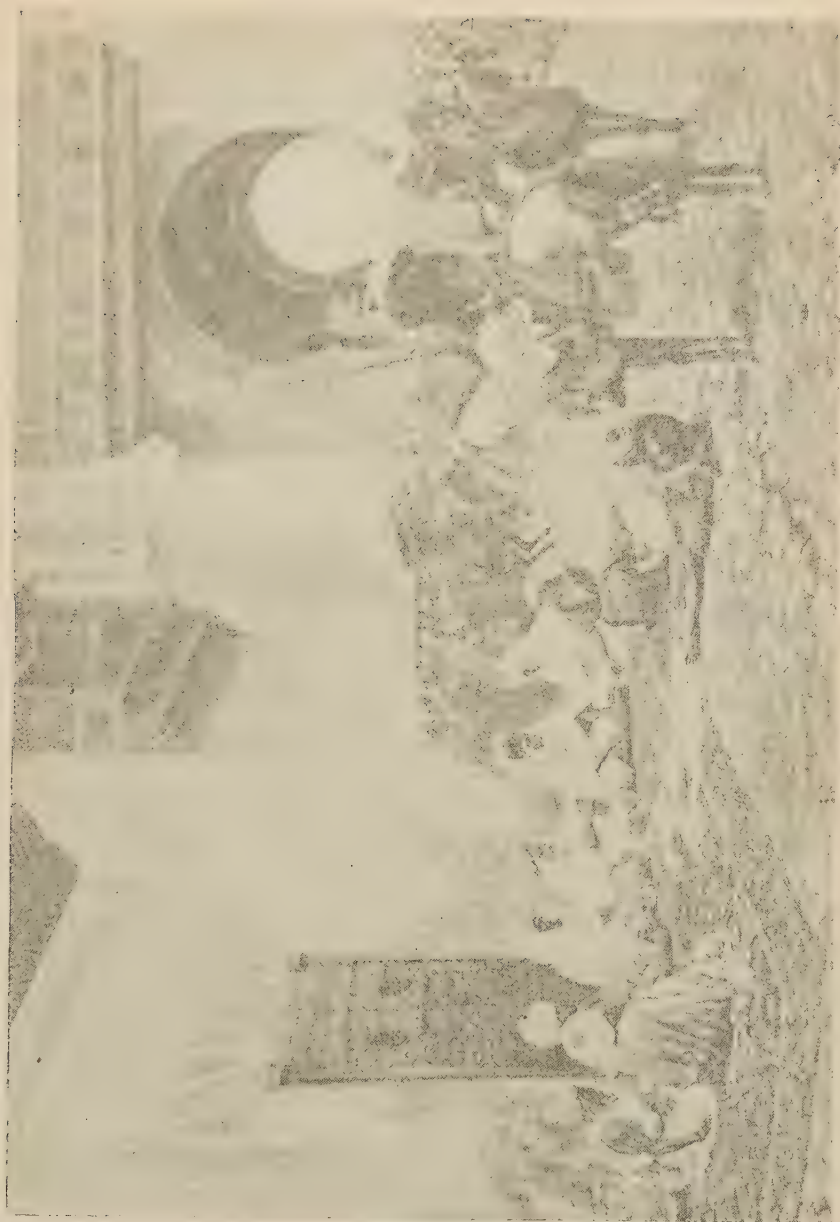
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IX. 6—CORDOBA; GATE OF PARDONS

almost the sole vehicle of the world's active intellectual and artistic progress (outside of eastern Asia). Cordoba was the finest capital in Europe; one of the places where justice was done, the so-called Gate of Pardons, may still be seen.<sup>6</sup> At a period when the Germanic tribes still dwelt in rough-hewn wooden hovels thatched and floored with straw, the Saracens of Cordoba and Seville

lived in abodes furnished with silken rugs and porcelain vessels, and ornamented with marbles and mosaic; and the city of Cordoba contained nine hundred public baths. At a period when in western Europe scarcely a single layman of any rank could sign his name, and only a few monks or priests could read and write, even the humble working-women of Cordoba made a living by copying manuscripts for the libraries of the rich. In the thirteenth century, in Christian Europe, there was scarcely a prince who had a library, and the largest library then known had only four hundred volumes; while in Cordoba, already in the tenth century, the Khalif's own library had five



IX. 5—GRANADA: JUSTICE AT THE GATE



## *Spread of Islam*

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hundred thousand volumes; and there were seventy public libraries besides. In the 900's, the University at Cordoba, attached to the mosque, was then the only one in Europe; it preceded the one at Bologna by three centuries. In this world-famous mosque of Abderrahman,<sup>7</sup> with its dazzling forest of twelve hundred marble columns in endless vistas, the Saracen scholars assembled in quest of learning; and among the thousands of students were found Christians from all parts of Europe. At Granada, the traveler may still see the remnants of another Moorish University, founded in the 1200's. In the sciences and arts, the Saracens were then the preëminent people; in architecture, in mathematics and astronomy, in geography and navigation, in medicine, botany, and pharmacy, they were almost alone. The first European medical school, at Salerno, borrowed almost everything from the Arabs, who had done more for medicine than all the centuries since Galen. Averroes, the Arab philosopher (who was himself a judge), introduced modern rationalism in philosophy; and the complete works of Aristotle, whose philosophy came to dominate in the 1200's, were known to Christian Europe only through Arabic translations from the Greek.

By the 1200's, however, the Renaissance in Europe was gaining strength; and Islam was coming to a stand-

## IX. Mohammedan Legal System

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still; and about this date begins the third period of Islamic legal history. That history falls into four periods: first, its foundations, in the early A. D. 600's; then its rapid expansion, east and west, to A. D. 1200, and the full development of its legal system; thirdly, from the 1200's, its period of political standstill; and lastly, from the 1500's, the transfer of most of its territories from independent Asiatic or African rulers to European Christian powers:

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### STAGES OF ISLAMIC HISTORY

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| PERIOD                       | EVENTS                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A. D. 600<br>A. D. 630       | FOUNDING OF RELIGION AND GOVERNMENT<br>Mohammed lived A. D. 570-632                                                                                                                                                                                                                                                                                                                                             |
| A. D. 650<br>A. D. 1100      | EXPANSION OF RELIGION AND DOMAIN<br>Muslim Law fully developed A. D. 900                                                                                                                                                                                                                                                                                                                                        |
| A. D. 1200<br>A. D. 1500     | CLOSE OF POLITICAL EXPANSION<br>Moors expelled from Spain<br>Turks checked in Hungary                                                                                                                                                                                                                                                                                                                           |
| A. D. 1600<br><br>A. D. 1900 | ISLAMIC REGIONS PASS TO CHRISTIAN POWERS<br><i>India</i> , to England. <i>East Indies</i> , to Holland<br><i>Algiers</i> , <i>Morocco</i> and <i>Tunis</i> , to France<br><i>Morocco</i> , to Spain. <i>Tripoli</i> , to Italy<br><i>Egypt</i> , independent. <i>Bokhara</i> , to Russia<br><i>Balkan States</i> , independent<br><i>East and West Africa</i> , to England, France,<br>Germany, Italy, Portugal |

Meanwhile, in the second above period, by A. D. 900, the Islamic legal system had been fully developed.



## *1. Sources of Law*

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### (II) CIVIL JUSTICE OF ISLAM

1. The legal system of Islam, like that of Judaism, is founded on the Word of God, or Koran. The law, or "shariah", is a part of the religion, not a separate thing. To the true Muslim, all other laws are but temporary and human. Islam, originally, for all the kingdoms established by its leaders, was what Greek Catholicism had already become, and what Papal Catholicism five hundred years later aspired to be—a comprehensive system of human life and social order,—religion, morality, politics, and law, all founded on revelation.

That this theory still is a living one can be seen in the epoch-marking Declaration of Independence of Arabia, on June 27, 1916, by which Arabia once more after twenty-six generations became independent. The Turkish Sultan had allied his empire with Germany in the World War; but Hussein, Emir of Mecca, revolting, and proclaiming himself as King of Hejaz, announced this policy:<sup>8</sup> "Arabia's principles are to defend the faith of Islam, to elevate the Muslim people, to found their conduct on the Holy Law, to build up the code of justice on the same foundation in harmony with the principles of religion, and to practice its ceremonies in accordance with modern progress". The author of this proclamation, King Hussein of Hejaz, was a lineal descendant of Mohammed,—the first de-

﴿ رَبَّنَا افْتَحْ بَيْنَنَا وَبَيْنَ قَوْمِنَا بِالْحَقِّ وَأَنْتَ حَكِيمٌ عَلِيمٌ ﴾

IX. 8—DECLARATION OF INDEPENDENCE OF ARABIA, JUNE 27, 1916

## 1. Sources of Law

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scendant for nearly seven centuries to become Khalif, outside of Persia. He remained for a time the ruler of Mecca, but later abdicated in favor of the Sultan of Nejd. However, hisson, King Feisal<sup>9</sup> of Mesopotamia, or Irak, ruled in Bagdad, the successor of Harun-ar-Rashid; Mosul was in his land, and he was known as the "oil king of the East". This recurrence of the line of Mohammed's succession in two great Islamic cities after many centuries illustrates the unpredictableness of history.



IX. 9—KING FEISAL OF IRAK

2. The sources of Islamic law are, therefore, three: first, the Koran, or word of God, as written down by Mohammed; secondly, the sayings and conduct of Mohammed, as preserved in tradition; thirdly, the treatises of jurists, elaborately developing from those fundamentals the legal rules applicable to all the affairs of life.

The Koran was originally written in the square inscriptional style of Arabic letters, known as Kufic;<sup>10</sup> but was later written in the so-called Neskhi script, now the

## *IX. Mohammedan Legal System*

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common modern style. Leather was in Mohammed's time the common material for manuscripts, but sometimes also camel's bones, parchment, and papyrus; after A. D. 900, paper is used exclusively, and papyrus disappears.

About A. D. 650 the Khalif Omar caused a single standard text of the Koran to be prepared, in three originals; all other versions were destroyed; and the text has never since varied in a single word, in any edition.<sup>11</sup> One of these three originals is still preserved under key at



IX. 10—THE KORAN: ORIGINAL KUFIC SCRIPT

AL-CORANUS  
S.  
LEX ISLAMITICA  
MUHAM-  
MEDIS,

FILII ABDALLÆ  
Pseudoprophete,

Ad epimorum Codicum fidem edita

APRATIAMI HENCKELMANNI, D.

II A M B U R G I,

Ex Officina SCHULTZIO-SCHILLERIANA.

ANNO 1894.

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ  
القرآن  
وهو  
شريعة الإسلام  
محمّد  
ابن عبد الله

IX. 11—THE KORAN: ARABIC AND LATIN

The Arabic page is the equivalent of the Latin title: "Al-Kran, wahu Shar'iah al-Islamiyyi Mu'addunah ila Abdallah". The word in heavy type, forming the second line from below, is "Mohammed".



## IX. Mohammedan Legal System

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Damascus, and is solemnly taken out once a year and exhibited to the elect.

3. But there is little law in the Koran. Hence, the *second* great source of Islamic law is found in the acts and sayings of Mohammed himself. These anecdotes represent Mohammed's philosophy of life and justice. The apostle himself, as leader of his tribe, in his lifetime acted as judge over the disputes of his people. In early Arab life, the mosque was like the Roman forum, the political meeting-place of the tribe; and what is now merely the pulpit of the mosque was once also the judge's seat.

It is certain that Mohammed had a profound instinct for law and order, almost Roman in its spirit. The following instance of his justice illustrates this trait:<sup>a</sup>

"A woman belonging to the tribe of Makhzum was found guilty of theft; and her relations requested Usama-bin-Zaid, for whom the Prophet had much regard, to intervene and entreat the Prophet to release her. The Prophet said, 'O Usama, do you mean to come to me and intercede against the laws of God?'; then the Prophet convened a meeting, and thus addressed them: 'Nations which have preceded you have been wiped off the face of the earth, for the one reason only, that they imposed punishment upon the poor and relaxed the laws in favor of the rich. I swear by God that if Fatima my daughter were to be found guilty of theft, then I would have her hands cut off'".

One of his recorded sayings was: "One jurist is more powerful against Satan than a thousand unlearned men

### 3. *Mohammed's Sayings*

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with their prayers." Another saying of Mohammed was: "When God wishes to favor one of his creatures, he sets him to learn the law, and word by word makes of him a jurist."

Some six hundred thousand anecdotes had been attributed to Mohammed by tradition; but after careful sifting and verification there remained seven thousand, now accepted as authentic. These are extant in two great collections. The chief one is that of Al Bukhari, who died A. D. 869; his *Sahih*, or pandects (there is a MS. of A. D. 1102),<sup>12</sup> contain about seven thousand sayings of Mohammed. This book is still in vogue as a source-book, and has been reprinted at Cairo in recent times.

Two or three of these typical anecdotes may serve to illustrate their general style and the manner in which a whole body of principles (here of testamentary law) was gradually built up from them.<sup>b</sup> The following passages deal with the law of succession; and it should be kept in mind, for understanding them, that heirs receive a fixed share, and legatees an amount discretionary with the testator; that (by later interpretation) an heir cannot be a legatee; and that the will, in Mohammedan as in early Germanic law, was used only to give property to others than the legal heirs:



### 3. Mohammed's Sayings

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[*The Koran, Sect. IV, Verse 12.*] "God bids that, in distributing an estate, a son receive as much as two daughters; if only daughters remain, and more than two, they receive two thirds of the estate; if only one, the half. Father and mother shall have each one sixth, if there is a child; if none, and parents take, the mother has one third; if brothers survive, the mother takes one sixth; provided that legacies and debts be first paid."

[*Al Bukhari, "Wills", Ch. III, Sect. 2.*] "Sahad tells: I was ill. The Prophet came to visit me. 'O Messenger of God, pray God that I get home before I die.' The Prophet said: 'Mayhap God will cure thee, to be useful among men.' I said: 'I would make a will, and I have only a daughter. I would will away half my estate.' Said the Prophet, 'The half is too much.' 'Then a third?' I asked. 'Yes, a third, but even a third is much'. Since then people have willed away as much as a third; for it is allowed."

[*Al Bukhari, Ch. X.*] "In the passage of Holy Writ 'if one declares a trust or makes a legacy in favor of one's kindred', what is to be understood by 'kindred'? Tsabit, as recorded by Anas, relates that the Prophet said to Abu Talha: 'Make that land an alms for the benefit of the poor among thy kindred'; and Abu Talha did so in favor of Hasan and of Obayî ben Kab. El-Ansari said: 'My father told me that he heard from Tsumama, who heard it from Anas, a saying similar to that of Tsabit; the Prophet said, "Make the alms in favor of the poor of thy family."'"

[*Al Bukhari, Ch. XXII.*] "Ibn Omar relates that Omar, in the lifetime of the Messenger of God, made an alms of one of his properties called Tsamgh, which consisted of a palm-grove. Omar said: 'O Messenger of God, I possess a property which is precious to me, and I would make alms with it.' The Prophet replied: 'Give it in alms, but provide that it shall never be sold nor given away nor divided among heirs, but the fruits of it shall be used.' So Omar made alms with the property, dedicating it to the use of the holy war, the ransom of slaves, and the support of the poor, of guests, of

## IX. Mohammedan Legal System

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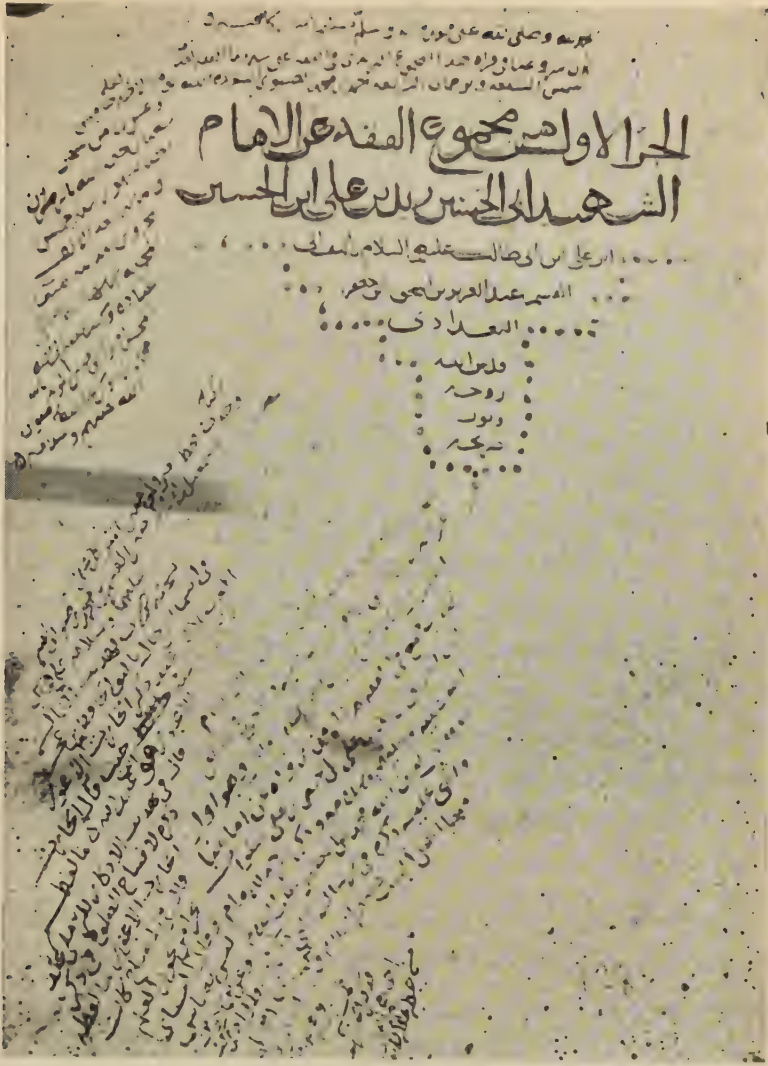
travelers, and of kindred. It was provided that the trustee might not unlawfully draw therefrom a moderate subsistence either for himself or for a friend, but that he should not enrich himself."

4. Mohammed's example, as a political leader and an administrator of justice, was a compelling inspiration. But there must have been a latent native genius for legalism in the Arab race; for within the next two centuries the judicial and juristic function was fully separated from the executive, as at imperial Rome; a professional body of specialists was developed; and the elaborate system of legal theory was by A. D. 900 well organized by scores of jurists all the way from Samarkand to Cordoba.

And their treatises represent the *third* great source of Islamic law. The earliest legal treatise now textually extant is that of Zaid Ibn Ali; it was composed for the Arabs of the Yemen (southern Arabia), before the great separation into Sunnites and Shiites.<sup>13</sup> Its text dates from about A. D. 760; the chief manuscript from about A. D. 1650; but it was only rediscovered in 1911, in the Ambrosian Library at Milan. It is authenticated (in Arabic fashion) by a chain of certificates, handed down for nearly 1000 years by successive disciples as copyists, verifying the words of the early master.

Four or five separate sects (or schools) of law later developed; each of them is founded on the views of some





IX. 13—TREATISE OF ZAID IBN ALI, ABOUT A. D. 760  
The earliest legal treatise on Mohammedan law now extant

## *IX. Mohammedan Legal System*

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famous early jurist,—as if we should have separate schools of legal thought founded on Glanvil, Bracton, Coke, and Bacon. But in the wide area of the Muslim domain, with different races and customs, these sects came finally to represent (in the main) separate regions,—somewhat as Canada, Australia, and the United States now have developed separate brands (so to speak) of Anglican Law.

The principal sects of Islamic law are four. The Shiite is found chiefly in Persia. The Malekite dominates in Mediterranean and middle Africa. The Hanefite prevails in Turkey, Turkestan, Syria, West Arabia, and parts of India. The Shafite obtains in Lower Egypt, South Arabia, Central Asia, and the Dutch East Indies. The last three of these sects are regarded as orthodox, or Sunnites; the first as heterodox. A fifth sect, the Hambalite, has a small following in Central Arabia. Each sect has its own extensive body of legal literature, ranging back through ten centuries.<sup>14</sup>

This vast body of Islamic learning consists (and this is its remarkable feature) entirely of works by jurists, not of government codes and statutes. But it includes, of course, varied styles of exposition,—sometimes a compact codified summary, sometimes a collection of legal opinions, sometimes a philosophical or analytical treatise.



IX. 14—MAP OF ISLAMIC LAW SECTS

The figures show the areas in which one or another sect is dominant



#### 4. *Treatises on Law*

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(a) As an example of the first sort may serve Khalil, the most popular jurist in the North African regions, expounder of the Malekite legal sect. His treatise, called the *Mukhtasar*, was written about A. D. 1360, and took twenty-five years to compose. Though very concise in statement, almost like a code, it is said to contain about one hundred thousand explicit propositions of law. More than seventy commentaries on it have been written by other authors in the last six centuries.<sup>15</sup>

A few passages will illustrate its peculiar concise style and also the degree of logical and juristic development which had been reached by Islamic law in the 1300's—a period at which English law had not yet developed the conceptions of bankruptcy or partnership.

[*Khalil, Tit. I, "Sales", Ch. IV, "Delivery."*]<sup>c</sup> "Where a sale is effected by measure, weight, or number, the things sold remain at the vendor's risk until they are measured, weighed, or counted.

"The expenses of delivery are borne by the vendor.

"The thing remains at the vendor's risk so long as it remains in its receptacle, even though the buyer has left the measuring to the vendor.

"The delivery of immovables is effected by the vendor giving up possession; the delivery of movables is effected in accordance with local custom.

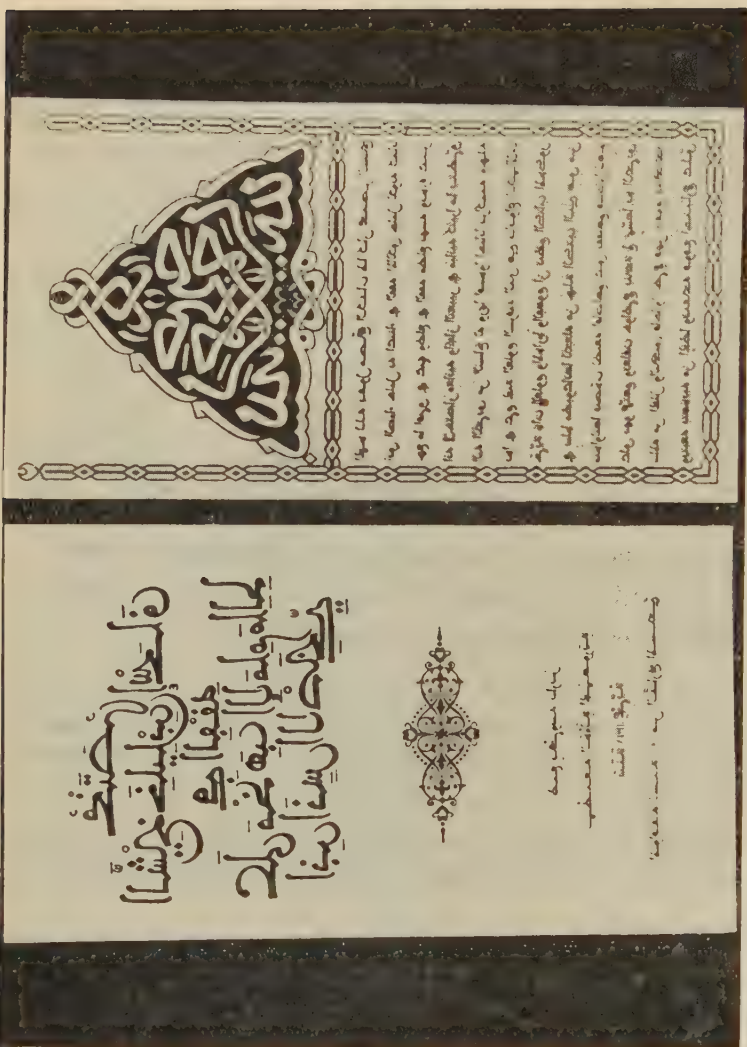
"In a perfect sale, the ownership of the thing, and the risks, pass to the buyer, by the mere consent of the parties, except where the vendor withholds the thing on account of non-payment, or where it



فَلَا تُحْزِنُنِي بِأَنْبَاءِ خَلْقِي  
لِيَلْمُوا بِمَا لَا يَحِقُّ لِي  
فِي خَلْقِي أَلَا يَسْأَلُ رَبُّنَا



سُبْحَانَكَ يَا رَبِّ  
مَنْ عَمِلَ بِمَا لَا يَحِقُّ لِي  
فِي خَلْقِي أَلَا يَسْأَلُ رَبُّنَا  
فَلَا تُحْزِنُنِي بِأَنْبَاءِ خَلْقِي



IX. 15—THE MUKHTASAR OF SIDI KHALIL, ED. 1900  
This author is the great authority for the Malekite sect, dominant in African areas

#### 4. *Treatises on Law*

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has been seized by judicial decree; in these two cases the vendor's responsibility is on a par with that of a pledgee.

"In case of dispute the payment of the price is primarily incumbent upon the buyer.

"If the object perishes by pure accident whilst still at the vendor's risk, he is relieved from his obligation to deliver it.

"If the vendor has caused the object to disappear or to deteriorate, or if a third person legally claims a share thereof, the buyer is entitled to rescind the sale.

"If the vendor is dispossessed of the greater part of the subject matter constituting the sale, the buyer cannot insist upon the sale of the remainder unless the said subject matter consists of res fungibiles."

[*Khalil, Tit. IV, "Bankruptcy".*] "[Ibn-'Arfa's definition: Bankruptcy is the judicially decreed forfeiture of a debtor's property in favour of his creditors, which arises owing to his inability to discharge his obligations].

"Every creditor can prevent his debtor, whose debts are greater than his assets, from gratuitously alienating anything; from leaving on a journey, if his debt is to fall due during his absence; from paying another creditor before his debt to the latter has fallen due; from making to certain creditors a general transfer of his property; and, according to Lakhmi and other jurists, from acknowledging debts towards suspected persons.

"The creditor cannot object to the debtor transferring a part of his assets or obtaining securities.

"A debtor shall be adjudged bankrupt in his presence, or even in his absence, unless known to be solvent. The said adjudication shall be effected upon the request of one of the creditors, where default is made in the payment of a debt which has fallen due exceeding the known assets, or where such payment would leave un-

## *IX. Mohammedan Legal System*

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covered debts that have not yet fallen due. Adjudication may be made notwithstanding opposition on the part of the other creditors.

“Adjudication deprives the bankrupt of the right of managing his property; but not from exercising his personal rights, such as repudiating, divorcing, exercising his right of retaliation, manumitting the mother of his child, or giving her her peculium if it be small.

“Adjudication renders the bankrupt’s debts demandable even though they have not become due, just in the same way as if he had died; even rent for an unexpired tenancy can be demanded without leaving the bankrupt, who was absent and returns solvent, the possibility of recovering the benefit of his term.

“The bankrupt shall be permitted to designate those chattels which are in his charge by way of deposit, and the depositors shall have to prove the identity of the several chattels.

“After determination of the bankruptcy proceedings, the bankrupt recovers his legal capacity for the time being; but on his acquiring new property it may be seized in favour of his unpaid creditors.

“The debtor may either have voluntarily parted with his assets in favour of his creditors who shall have sold them or divided them up, or he may have been judicially deprived of his assets; in either case, if he contracts new debts, the new creditors shall be placed on a par with old creditors only as regards assets the debtor may have obtained by way of inheritance or as the result of causes pre-existing to his first bankruptcy, as for example a claim for blood-money.

“The bankrupt’s chattels shall be sold in his presence under reserve of option to be exercised within three days. Even his books of science and religion and his Friday garments shall be sold if their value is at all considerable.

“A bankrupt cannot be obliged to work or to borrow, to exercise his right of pre-emption or to give up his right to the exercise of

#### 4. *Treatises on Law*

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retaliation and accept blood-money (diyyah), to deprive his slave under any form of future manumission of his peculium, or to revoke a gift made to his child.

"The sale of animals shall be proceeded with within the shortest delay, and within two months or so immovables shall be sold.

"The proceeds of the sale shall be distributed pro rata among the inscribed creditors, without their having to prove the non-existence of other creditors.

"The claims of a bankrupt's wife with regard to her dower rank with those of the creditors, just as they do in the case of her husband's death; similarly she can claim the expenses she may have incurred for his maintenance, but not for that of his child by her.

"Where heirs to a succession encumbered with debts or known by them to be so, shall have nevertheless paid some of the creditors, these heirs shall conjointly be answerable to any other creditor who subsequently puts in a claim; each heir's liability to be proportional to his share of the succession. The creditor can, for the balance that may still be due, put in a claim against the creditors who have been paid, and obtain a redistribution of the assets.

"The creditors shall for a period varying according to circumstances leave a bankrupt in possession of some food and of sufficient money with which to meet his most urgent needs. They shall allow him and each member of his family one working garment."

[*Khalil, Tit. IX, "Partnership"*.] "A partnership is a contract by which each partner is authorized and is enabled to empower another to administer the common property.

"Partnership can only exist as between persons under no legal disabilities.

"Partnership is made perfect by the mere consent of the parties, given either tacitly in accordance with local custom, or expressly by a stipulation followed by a conformable answer.

## *IX. Mohammedan Legal System*

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“The shares contributed towards the common concern may both consist in gold, or both in silver coin having current value, or each in gold and silver, or one in money, the other in something capable of being estimated, or both of a thing capable of being estimated, but the estimation thereof shall be effected on the day the contract is made, not on the day on which the thing perishes, if it should so happen, excepting the case where the partnership is annulled *ex post facto*.

“The property held in common remains at the risk of the partnership if the partners have amalgamated their contributed shares, even though the latter can be materially distinguished; in the contrary case, each share remains at the risk of its respective owner. If one of the shares perishes, any purchases made with the remaining share go to the account of the partnership, and the partner whose share has perished must refund half the price to his co-partner.

“Nevertheless, it has been held that the profits or losses of the said purchases shall only then be apportioned if the purchasing partner knew of the loss of his partner's share. Again, it has been held that the profits and losses shall always be divided, except where the purchasing partner proves that it was his intention to buy for himself only.

“Even though the share of one of the partners has not been actually delivered, the partnership shall nevertheless exist, provided the share is to be delivered within a short delay, and that transactions are only to be commenced when the said share is available.

“In default of special stipulations as to the mode of administration, the members of a partnership are presumed to have discretionary powers, even though the partnership's object consists in a specific enterprise.



#### 4. *Treatises on Law*

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"A clause by which one of the partners should reserve for himself the right to trade on his own account by means of a separate fund does not vitiate the contract.

"Either partner may without his co-partner's consent: commission a hawker; provide funds for another enterprise; make a deposit, subject to his being held responsible if made for no valid reason; rescind a bargain; transfer a bargain to a third person; refuse to rescind a contract, even against the wish of his co-partner; formally admit a partnership-debt in favour of unsuspected persons; sell on credit.

"He may not, without his co-partner's assent, buy on credit; liberate a slave either conditionally or for money paid; put a slave in charge of a business; or associate a third person in the partnership.

"Shall be considered as on his personal account: any dormant partnership of which he accepts the administration; any loan contracted by him even in the interest of the partnership, if contracted without the co-partner's consent; any profit or loss made by him by illegally trading with a deposit, without his associate being an accomplice. . . .

"Each partner's share in the profits and losses shall be in proportion to the funds each has provided; any contrary stipulation is illegal, and each partner must account to the other.

"If it has been stipulated that one partner shall not be allowed to do anything without his co-partner, such a partnership is said to be one with limited powers.

"Where one of the partners is commissioned by the other to buy some definite object on behalf of the partnership, they may agree between themselves that the buyer shall advance the funds for the purpose, provided the commissioning partner has not stipulated that he will trade with the thing thus to be bought before he has refunded the buyer his share of the purchase money. If no such stipulation has been made and the transaction has been carried out

## IX. Mohammedan Legal System

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by the buyer advancing the funds, he has no lien upon the thing bought with his advance. If, however, a contrary stipulation has been made, he may retain the thing as a pledge."

(b) The second style of book, *Futawa*, or legal opinions on cases presented, is much used by modern kadis (or judges) as a reference book, though it is not studied in the schools. The most famous early collection is the *Futawa Alemghiri*, a book once in wide vogue in India, composed about 1650, and still in use when the English took over India. Numerous modern collections have appeared, especially in North Africa, down to our own times.

The "*futawa*", or opinion, emanates from a counsellor, or jurisconsult, whose status in the legal system closely corresponds to that of the private jurisconsult in the classic Roman law and the Romanesque law of the Renaissance. This status can be better understood from the brief description of legal education and the judiciary system (*post*, page 574), and from the examples taken from a modern lawsuit (*post*, page 593). The decisions of judges, adopting the principles advanced by a jurist in a "*futawa*", or opinion, or brief, formed also a source of authority (known as "*amal*"); and collections of these in print form also a minor source of law in some regions.

(c) Of the third style of treatise, the analytic discussion of theory, an illustration may suffice, taken at

#### 4. *Treatises on Law*

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random from the Hedaya, by Burhan Adin Ali, written about A. D. 1200, representing the Hanefite sect, dominant in India and Turkey:<sup>d</sup>

[*The Hedaya, Book XV. Of Trusts.*] “A trust, upon becoming valid (that is, absolute, according to the various opinions of our doctors, as here stated,—according to Hanifa, in consequence of the grantor’s declaration and the magistrate’s subsequent decree, and according to Abu Yusaf, by his simple declaration, and according to Mohammed, by his declaration and delivery to a trustee), it passes out of the possession of the grantor; but yet it does not become the property of any other person; because, if this were the case, it would follow that it is not in a state of detention, but may be sold in the same manner as other property; and also, because if the person or persons to whom it is assigned were to become the proprietor of it, it would follow that it could not afterwards pass out of his possession in consequence of any condition stipulated by the former proprietor,—whereas it is not so, for if a person were to declare a trust of a dwelling-house (for instance) to the poor of a particular tribe, and the poverty of any one of these were afterwards removed, the right in it passes to the others, which it could not do if this person were a proprietor.

“Any undefined part of a thing may be placed in trust. A declaration of trust of an undefined part or portion of anything (such as the half, or the fourth, of a field, house, etc.) is valid, according to Abu Yusaf. Hussein alleges that a trust of this nature is invalid; because as actual possession is held by him to be an essential (by the trustee taking possession of the article appropriated), so, in the same manner, that without which possession cannot take place is also an essential, namely, partition; and this can only be in a thing capable of partition. . . . The ground upon which the opinion of Abu Yusaf proceeds is, that the partition of an indefinite part of anything is indispensable to the taking possession

## *IX. Mohammedan Legal System*

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of it; but as the taking possession is not (according to him) essential in a case of a trust (whence the means of taking possession is also unessential), it follows that the trust of an indefinite part of anything is held by him to be valid. From this rule, however, he excepts a mosque, or burying-ground, a trust of any undefined portion of which is invalid, although it be of an indivisible nature; because the continuance of a participation in anything is repugnant to its becoming the exclusive right of God; and also, because the present discussion supposes the place in question to be incapable of division, as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purposes, such as its being applied one year to the interment of the dead, and the next year to tillage, or, at one time to prayer, and at another time to the keeping of horses, which would be singularly abominable. It is otherwise with regard to the appropriation of anything else than a mosque or burying-ground; because the appropriation of an undefined portion of any other matter, where it is of an indivisible nature, is decreed to be lawful by all our doctors, as it may be hired (for instance), and the parties may divide the rent.

“If a person declare a trust of land, and it should afterwards appear that an indefinite portion of the land (such as the fourth) was the property of another person, the trust is void with respect to the remainder also, according to Mohammed; because, in this instance, the separation into indefinite divisions is associated with the trust, which is consequently invalid, in the same manner as a gift . . . . . If, however, it should appear that another is entitled to a portion of the land, of a specific and not an undefined nature, in this case the trust is not void with respect to the remainder, because of no indefinite division existing in this instance: and gifts and charitable donations are also subject to the same analogy.”

If it is remembered that this style of metaphysical analysis had been developed by a jurist in Turkestan, who

#### 4. *Sources of Law*

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died (A. D. 1213) at a time when the revival of Roman law, three thousand miles away in Italy, was still in its embryo stage, and when Germanic law, after seven hundred years of written growth, had done nothing better than the crude Mirror of Saxony (A. D. 1200, *post*, Chapter XII); one gains a better impression of the extraordinary precocity and originality of the Mohammedan system.

5. Conveyancing of property, in the Islamic system, reached a development well comparable with that of the modern Anglican system,—not only in the standard forms but also in the technical conceptions.

Two examples will suffice:

(1) The “wakuf”, or trust, founded on the anecdote of Mohammed last above quoted from Al-Bukhari, and discussed in the passage from the Hedaya, exhibits the remarkable juristic instinct of the Arab thinkers. In the “wakuf” they invented a legal concept which equals if not excels in originality and practical utility the Anglican trust; it combines the ideas of trust, family entail, and charitable foundation. The grantor transfers the bare legal title to God, and appoints an administrator to manage the property for the beneficiary; thus there are four parties to the transaction. This expedient has proved so flexible and so popular that in the Ottoman Empire three-fourths of the city lands were held by this tenure.



## *IX. Mohammedan Legal System*

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Volumes have been written on this institution. The passage above quoted from the Hedaya exhibits some aspects of the logic of the "wakuf". And the following modern judgment interprets a deed employing it to establish an entail;<sup>e</sup> in this opinion (as sometimes in those of our own courts) the plain text of a rule seems to suffer emasculation by interpretation:

"Praise be to God. The late.....  
having during his lifetime entailed in trust all his real property, both within and without the city, to the benefit of his male children, viz.....and....., to the exclusion of the daughter, as shown in a deed of record in this court dated .....,

"Now appears before this court....., husband of the said daughter, and in her name, by virtue of a power of attorney given by her to him, demands possession of the share of the estate inherited by his principal from her father, if the holy law does not forbid. Such is his claim.

"Her brothers answer that their father has by deed excluded her from the entail, and that she is therefore not entitled to share with them.

"The honorable court, having heard the respective arguments of the parties, and considered the issue fully, holds (may God favor him!) that the entail is valid and that the daughter of the grantor has no right of succession. As a ground for this conclusion, and as settling the doubt in his mind, he cites the following passage from the Jurist Khalil: 'A trust-entail is not good . . . . . if it is made to the benefit of the grantor's sons to the exclusion of

## 5. Conveyancing

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his daughters"; as interpreted by the Jurist Derdir [about A. D. 1780]: 'Such an entail is indeed to be deemed morally censurable; but after the grantor's death his deed cannot legally be deemed void'. Such also was the view of Ibn el Kassim [about A. D. 1720], and it has been followed in practice. The Jurist Abou el Hassen [about A. D. 1300] has clearly shown that the treatise Mudawan [about A. D. 1100] deems a provision of this kind to be only more or less censurable, but not invalid.

"Final judgment rendered this day,....., after due notice and hearing, at a regular session of the court in....."

(2) The other example may be taken from the law of inheritance. For certain reasons, needless here to expound, the refinements of the ordinary Mohammedan inheritance rules are more complex than the Anglican. Keeping in mind the general rule laid down in the Koran (quoted *ante*, page 551) for the relative shares of the several next of kin, we may take an example of the working out of the rules of distribution on these facts: Deceased leaves a wife and, by her, two sons and two daughters; then the wife dies, leaving a mother; then one daughter dies, leaving a husband; and the shares are now to be partitioned:<sup>f</sup>

"Here we have first to consider what would be the portions if the wife and daughter had not died. Remembering that the wife's share is one-eighth, and the children are the father's residuaries, and that a son's share is twice a daughter's, we have:

## *IX. Mohammedan Legal System*

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(1) Wife,  $1/8$

Residue,  $1 - 1/8 = 7/8$ , to be divided in the ratio, 4:2, or 2:1.

Sons,  $2/3$  of  $7/8 = 7/12$ ; each =  $7/24$

Daughters,  $1/3$  of  $7/8 = 7/24$ ; each =  $7/48$

(2) Now the wife dies, leaving her mother a sharer, and the four children her residuaries.

Wife's mother,  $1/6$  of  $1/8 = 1/48$

Residue,  $1 - 1/6 = 5/6$ , to be divided in the same ratio as the former residue, hence:—

Each son,  $1/3$  of  $5/6$  of  $1/8 = 5/144$

Each daughter,  $5/288$

Adding these to the original portions, we have:—

Each son,  $7/24 + 5/144 = 47/144$

Each daughter,  $47/288$

(3) Lastly, one daughter dies, leaving her husband a sharer, and the two sons (her brothers) and the daughter (her sister) her residuaries.

Husband,  $1/2$  of  $47/288 = 47/576$

Residue,  $1/2$  of  $47/288$ , to be divided in the ratio 4 : 1

Each son,  $2/5$  of  $1/2$  of  $47/288 = 47/1440$

Daughter,  $1/5$  of  $1/2$  of  $47/288 = 47/2880$

Adding these to the portions last found, we have:—

Each son,  $47/144 + 47/1440 = 517/1440$

Daughter,  $47/288 + 47/2880 = 517/2880$

## 5. *Conveyancing*

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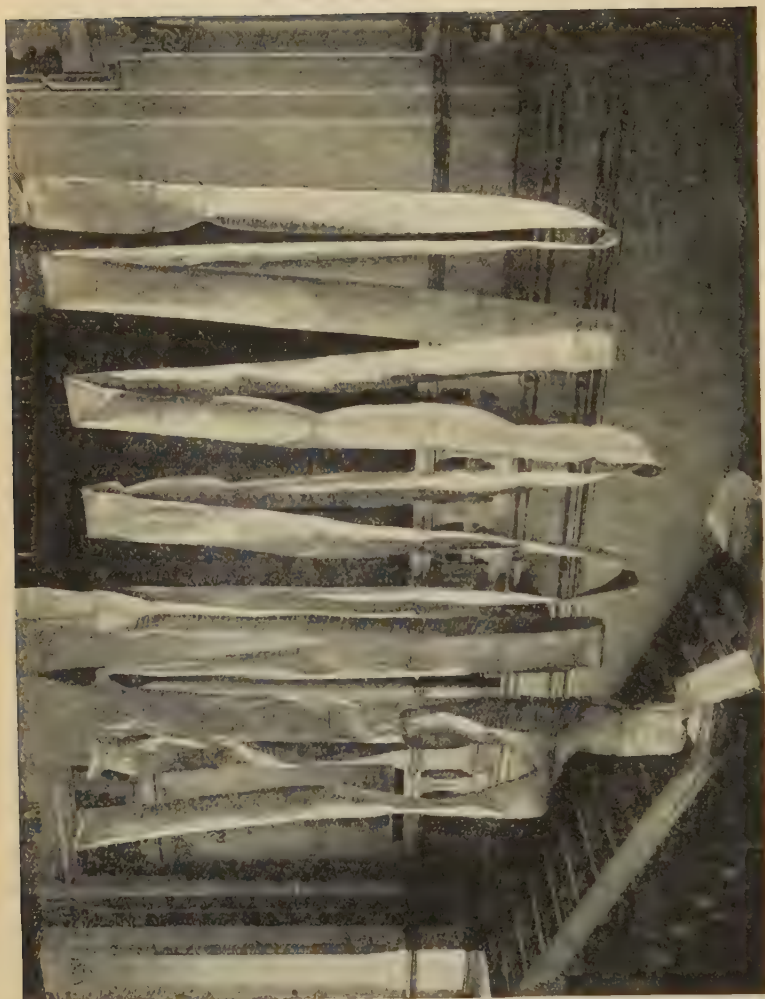
Reducing  $1/48$ ,  $47/576$ ,  $517/1440$ ,  $517/2880$ , to the least common denominator, we have in conclusion:

|                    |               |
|--------------------|---------------|
| Wife's mother      | $60/2880$     |
| Daughter's husband | $235/2880$    |
| Each son           | $1035/2880$   |
| Daughter           | $517/2880$ ." |

From these two examples it is easy to conceive that the conveyancing of Islamic law was at least as complex as the Anglican.

Paper was used by the Arabs after A. D. 800, and the pages of a transactional instrument were often pasted together in a continuous roll. And so, not only may the statement of an eminent scholar be credited<sup>g</sup> that some trust-deeds in the Khedivial (now Royal) Library at Cairo are 75 feet long, but in fact a deed has recently there been discovered that is 135 feet long<sup>16</sup>—perhaps the longest deed in the world; it dates from the 1500's, and establishes a trust in favor of the grantor's heirs and freedmen.

The execution and authentication of legal instruments were well provided for. The kadi sometimes performed the functions relegated to the notary in the Romanesque system, and to the recorder of deeds in the modern Anglican system. Some modern documents showing the style in Morocco are set forth in the lawsuit de-



IX. 16—MOHAMMEDAN TRUST DEED, 135 FEET LONG  
Perhaps the longest manuscript deed in the world; now in the Royal Library at Cairo



## 5. Conveyancing

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scribed later (*post*, p. 593). The daily scene before a kadi of Persia in the late 1600s is thus pictured by an eye-witness, an English doctor in the East India Company's service:<sup>h</sup>

[*The Kadi as a Notary.*] "To the cadi's cognizance belongs all manner of contracts, conveyances, and settlements; to which purpose near his door are such as make instruments ready written for sale, in the style of their law, to be presented for the cadi's perusal. Into which inserting the names of John-a-Nokes and John-a-Stiles, Zeid and Ambre, the cadi calls aloud, 'Zeid, where art thou?' who answers 'Here', upon appearance: when the cadi proceeds; 'This house, garden, or land, or anything of that kind, Dost thou sell willingly, and of thy own accord to Ambre?' He affirming, 'Aree, yes.' 'Is the price agreed between you?' 'Yes.' 'Where are your witnesses?' says the cadi; then he replies, 'I have brought them,' who answer for themselves; the cadi asks them, 'Do you know this to belong to Zeid?' Who affirm, it is known to all the town, even to the children. The cadi after these interrogatories, lifts up his voice, and says, 'Does no one forbid this contract?' At which, they jointly cry aloud, 'No one forbids': Whereupon the cadi calls for his seal, which are words engraven on silver; and dipping it in ink, stamps it three or four times in three or four places, especially at the junctures of the indenture, that no room may be left for fraudulent dealing, they not putting their own hands, nor delivering it as their act and deed; but the cadi makes the obligation firm on this wise.

"Usury is forbid by Mohamet, yet no place extorts more for money lent; for ten thomands in a year, shall at a moderate calculation bring them in thirteen every year; . . . Those who desire to secure their money thoroughly, come to the cadi for a bond, being agreed first on their contract among themselves to pay fifteen, twenty, and sometimes thirty thomands for the use of one hundred for one year. When the money is brought in two bags, with a knife,



LX. 17—PROFESSOR AND CLASS, IN THE BLUE MOSQUE, CAIRO  
Mohammed said: "Whoever taught me a single word, I was his slave."

## 6. *The Legal Profession*

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book, or mantle, and the owner Zeid cries out before the *cadi*, sitting on the seat of justice: 'I Zeid do give frankly for the space of one year one hundred thomands; but I sell this book for fifteen, twenty, or thirty thomands to Ambre, and he is content to give it; therefore I desire in the presence of the *cadi*, that Ambre may be obliged at the year's end to repay me my hundred thomands, according to agreement', and then seizes the fifteen, twenty, or thirty thomands, according to agreement for the book; or if he lets him have the whole hundred, the *cadi* asks Ambre, 'Art thou content to give this sum?' And he answering, 'Aree, yes', goes on, 'So thou art debtor to Zeid an hundred and fifteen, twenty, or thirty thomands, payable this time twelve months, being fully expired'; to which he replying 'Aree', it is valid in law. In which form of writing such caution is used, that they trust not figures, nor bare words that express the sum entire, and at length, but halve it and part it to prevent equivocation; for example, the sum of an hundred fifteen thomands is the principal, the half whereof is fifty seven and an half; the fifth part is twenty three; deluding hereby the skill of the most subtle sophister, since the subsequents so inexpugnably strengthen the antecedents."

6. We are now prepared to infer that such a legal system could not possibly have been developed or administered without a trained professional class. And what we do find is the most highly organized plan of legal education and judicial training that any of the world's legal systems have ever known. Indeed, it may be affirmed that systematic higher education was the greatest feature in the political and legal success of Islam.<sup>17</sup> Over the gate of the College of Ali is inscribed the saying of Mohammed: "Whoever taught me a single word, I was his slave".

## IX. Mohammedan Legal System

The system of education was this:<sup>1</sup>

SCHEME OF LEGAL TRAINING IN ISLAM (Turkish)

| Stage | Name of School                | Kind of Degree<br>(analogous) | Qualified as                           |               |
|-------|-------------------------------|-------------------------------|----------------------------------------|---------------|
|       |                               |                               | Judge                                  | Counsellor    |
| I     | Kharije                       | A. B.                         |                                        |               |
| II    | Dakhil                        | LL. B.                        | Inferior Magistrate<br>( <i>Naib</i> ) |               |
| III   | Sahn                          | LL. M.                        | Superior Judge<br>( <i>Kadi</i> )      |               |
| IV    | Suleimanye                    | LL. D.<br>(8 grades)          | Provincial Judge<br>( <i>Devriye</i> ) | <i>Mufti</i>  |
| V     | (Teaching in above faculties) | LL. D.<br>(4 grades)          | Supreme Judge<br>( <i>Mevleviyet</i> ) | <i>Mollah</i> |
|       |                               |                               | Shaikh-ul-Islam                        |               |

No one could hold judicial or legislative office until he had received an appropriate higher education in the religious law. Men learned in the law were known as "ulema". There were two classes, judges and jurists (in Arabic, "kadi" and "mufti"); the latter embraced both legislative and private advisory functions, but were not advocates in the narrow sense. There were five principal stages or grades of attainment; and for each grade there

## 6. *The Legal Profession*

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was a degree, or title, with a diploma. After receiving each degree the candidate might go on to a higher institution of study. The first degree (or A. B. as we should say, meaning general higher education) must be obtained by all, but did not alone qualify for any office. The second degree (or LL. B.) qualified to hold the post of Naib, or justice of the peace. The third degree (or LL. M.) qualified to become Kadi, or superior court judge. In the fourth degree (or LL. D.) there were twelve grades; the eighth of these grades qualified to become provincial judge or to become a "mufti" (jurisconsult, jurist), whichever the aspirant might choose; and the twelfth and last grade made of him a "mollah", and qualified him to become a Supreme Court judge or a professor in the highest faculties. All of this education was free; and all of these degree-holders received an official stipend.

The entire body of learned men ("ulema") was grouped under a chief, at Stamboul (Constantinople), the Shaikh-ul-Islam, who was thus the Sultan's supreme adviser in religion and law, and ranked with the Grand Vizier or prime minister. "He is the supreme judge" says an English traveler of the 1600s,<sup>i</sup> "and rectifier of all actions, as well civil as ecclesiastical. The place is given to men profoundly learned in their law and of known integrity. He seldom stirs abroad, and never admits of



## *IX. Mohammedan Legal System*

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impertinent conversation. Grave is his look, grave is his behavior,—highly affecting silence, and most spare of speech. He commonly weareth a vest of green, and the greatest turban of the empire,—I should not speak much out of compass should I say as large as a bushel.”<sup>18</sup>

The Shaikh-ul-Islam, with his council, might exercise virtually legislative as well as judicial functions; thus his “futawa”, or opinion, had something the status of an imperial rescript in Roman times. This may be illustrated by the celebrated “futawa” authorizing the use of the printing-press, in 1738. Until that time there had been no printing-press in Turkey, and the very proposal spread alarm. So resort was had to the Shaikh-ul-Islam, and his “futawa” read as follows:<sup>k</sup>

“Question: If Zaid, who pretends to have ability in the art of printing, says that he can engrave on molds the figures of letters and words of books edited on language, logic, philosophy, astronomy, and similar secular subjects, and produce copies of such books by pressing the paper on the molds, is the practice of such a process of printing permissible to Zaid by canon law? An opinion is asked on this matter.

“Answer: God knows it best. If a person who has ability in the art of printing engraves the letters and words of a corrected book correctly on a mold and produces many copies without difficulty in a short time by pressing the paper on that mold, the abundance of books might cheapen the price and result in their increased purchase. This being a tremendous benefit, the matter is a highly



IX. 18—THE KADI, WITH MUFTI ATTENDING

## *IX. Mohammedan Legal System*

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laudable one. Permission should be granted to that person, but some learned persons should be appointed to correct the book the figures of which are to be engraved."

Islamic law was thus uniquely organized in its distribution of all the functions of justice between these two separate classes, the judge and the jurisconsult, in one general body.

7. The judge's status has always been especially honored in Islam. Copious biographies, forming a special branch of historical literature, perpetuated the names of judges famous for their wisdom, in a manner paralleled only in the Hebrew and the Anglican systems. Tradition hands down many maxims for the judge's ideals. The Khalif Ali said: "Thy tongue is thy servant—until thou speakest; then thou art its servant. Hence have a care what judgment thou givest." In Khalif Omar's instructions to one of his first kadis, some 1300 years ago, he formulates these principles, worth attention by any judge of modern times:<sup>kk</sup> "Justice is thy bounden duty, the path which thou must follow. Give ear carefully to the parties who apply to thee; for how futile to seek one's rights if the judge listens not? In all thy doings and decisions, treat all persons alike, so that the great man may not reckon upon thy favor, nor the humble man despair of thy justice. If yesterday

## 7. *The Judiciary*

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thou hast given a judgment but upon reflection thou findest reason today to correct thy opinion, do not hesitate to follow the truth as thou seest it, for Truth is eternal, and it is better to change to the truth than to persist in an error."

The office of kadi, in the Muslim organization, came to become one of broad responsibilities. Some of its duties are thus described (about A. D. 1375) by the eminent jurist Ibn Khaldoun, who had lived in all parts of the Muslim world and had himself served many years as chief kadi at Cairo:<sup>kkk</sup> "Though the early khalfs [the vice-gerent of God] included the function of judge in their attributes, the increase of their other duties led to the delegation of this function to others. The kadis, in their earlier period, acted merely as judges between litigants. But as the administration of extensive domains grew in complexity, other duties were gradually added to them. In the later periods they acted not only as judges in lawsuits, but supervised many other activities of the community. They managed the property of the insane, of orphans, of bankrupts, of spendthrifts, and other incapables. They supervised the administration of charitable foundations and of decedents' estates. They arranged the marriages of orphan girls (belonging to their religious sect) when there was no natural guardian. They acted

## IX. Mohammedan Legal System

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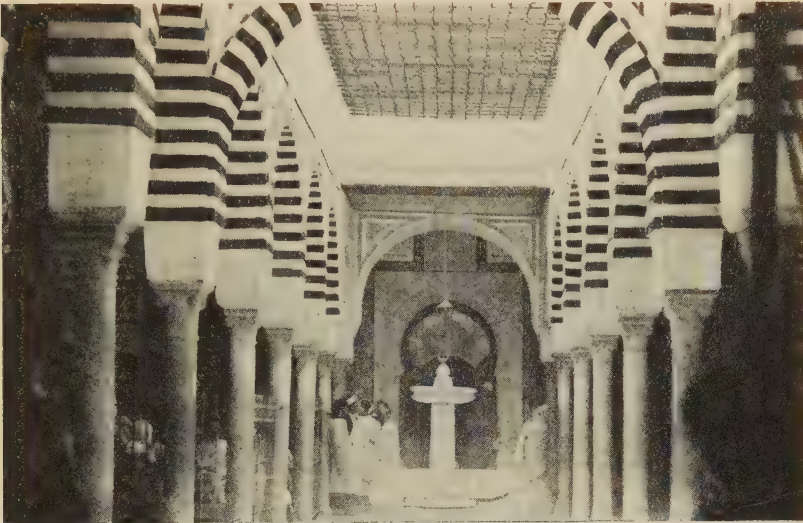
as inspectors of streets and buildings. They kept records of character and status and trades, so as to be able to certify to the credibility of lawful witnesses. And such today are the powers and duties of the kadi”.

As the judge sat in his courtroom (usually in or near a mosque) surrounded by his assessors, readers, clerks, and bailiffs, none could approach or speak to him, even the highest, without permission. This tradition of dignity and respect has continued to the present day. In Morocco, “holding daily sessions (except Fridays and holidays), all the year round without vacations, his courtroom thronged continuously with patient suitors, the kadi sits immobile on his dais, enveloped in his long white robe; his gestures are slow and dignified, full of the unction which befits a sacred office; his words are few, well-chosen, and courteous.”<sup>1</sup> Tunis is said by experienced travelers to be the most Oriental of modern Mohammedan cities; and the following vivid pen-picture (in the early 1900’s) of a divorce-suit in the kadi’s court at Tunis gives us the atmosphere of a Mohammedan lawsuit in that region; the parties here were an Arab husband and his English wife:<sup>m</sup>

[*A Divorce Tribunal in Tunis.*] “All domestic or family affairs come before the *cadi*, who for the time being represents Mohammed.



## 7. *The Judiciary*



IX. 20a—COURT ANTE-ROOM AT TUNIS

"After satisfying the porter at the outer gate that we had no camera about our persons, we experienced no difficulty in gaining admittance to the square court-yard which faces the law-court, and which is exactly similar in the style of its architecture and in character to the colonnaded patio of all Arab houses. The little rooms where the judges administer justice open off this court-yard just as the bedrooms and public rooms opened off the two court-yards in Monsieur Amour's harem.<sup>20<sup>a</sup></sup>

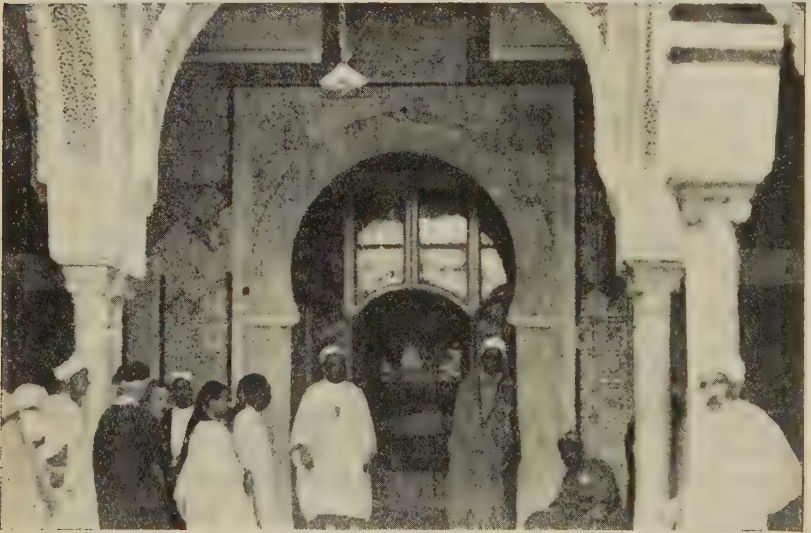
"When we entered there were quite a number of long-bearded, high-stomached, pallid-faced Moors and elderly city-bred Arabs walking majestically about the sunny square, all carrying rolls of parchment in their hands—legal documents, I suppose . . . . I was suddenly confronted with the most Oriental picture I ever saw; and there also, in the centre of that green-lined court of the *cadi*, stood Sylvia Ajeeb . . . . a slight, grey-clad English figure standing before three large and resplendent judges, who sat

## *IX. Mohammedan Legal System*

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humped up on their yellow-slipped feet on broad green upholstered benches, surrounded by orange-yellows and lemon-yellows and grass-greens and almond-leaf greens and salmon-pinks. (This mingling of greens of every shade, from the pale pistachio green to the strong Mohammedan grass-green, and the variety of yellows ranging from orange to pale canary and lemon, is typically Mohammedan.) When my brain had found its focus I saw that Monsieur Ajeeb was standing beside his wife,—a magnificent figure in white cloth, his flowing cloak and clothes richly embroidered and tasselled with silver; and that this scene I had come upon so suddenly signified that Sylvia Ajeeb was standing before the *cadi*—that she was, in plain English, being divorced.

. . . . . "The court-house was long and narrow and ran broadside with the court-yard.<sup>20b</sup> The walls were hung with grass-



IX. 20b—IN FRONT OF THE COURTROOM AT TUNIS

## 7. *The Judiciary*

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green cloth, and green silk covered the benches and luxurious cushions . . . . . The Judges sat cross-legged on high green hassocks underneath highly coloured texts from the Koran; and in all my days I have never seen three graver, wiser, more dignified figures . . . . . The Supreme Cadi (or Sheik-ul-Islam, as he is called) sat on a similar green bench in a little green alcove at the end of the green room. *He* looked even more like a heathen god than the other three, and was still more gorgeously arrayed in salmon-pink and deep orange, and his lofty turban, my guide pointed out, had a vertical division right up the centre; this division of the folds signifies apostolic succession, so to speak. These coiled and towering white turbans give a very majestic and prophetic appearance to grave Eastern faces. Certainly these four wise men of the East looked as though the mantle of the Prophet had fallen upon them.

“Have I in the faintest manner conveyed the picture to you? A vivid green room with nothing in it but the green-cushioned benches and the four stately turbaned figures seated on those benches in grave and awful silence, their orange draperies falling in long lines from their shoulders to the floor, their white-turbaned heads showing clearly against a background of grass-green . . . . . I must own that dainty and beautiful as Sylvia is, she looked totally insignificant beside these Eastern potentates of ecclesiastical justice. The long flowing lines of the Arabs’ dress make Western fashions look foolish and hopelessly vulgar.

“With unchanging expressions they went on reading the long legal documents, which were rolled up just as all things that were written used to be rolled up in biblical days. As they turned the roll round and round, the parchment fell over their fine yellow slippers and almost touched the green carpet in front of them.

“Poor little Sylvia, in her French frock and frills, was standing all this time in nervous silence before these sphinx-like representa-

## *IX. Mohammedan Legal System*

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tives of the Prophet . . . . . Monsieur Ajeeb's lawyer, who had apparently handed the judge the written account of the case, was standing close to the bench and occasionally whispered something to him . . . . . But if the *cadi* before whom she was standing had any thoughts upon the subject he did not show it by the lifting of even an eye-lash. I wondered if he would ever stop reading the document he held in his hand. How anxiously I watched the roll grow thinner and thinner, and the coil on the floor in front of him grow bigger and bigger. Would he never speak!

“ . . . . . The text of the *Koran* on the wall opposite caught my eyes, and I kept repeating to myself the last prayer of the Prophet. I wondered if it was that prayer which was written on these green glasses in letters of quicksilver: ‘Lord grant me pardon and join me to the companionship of light.’ Outside this silent green tribunal of the *cadi* I could see the beautiful court-yard filled with vibrating light. The black and white of the arches looked more black and white than ever by their contrast to the vivid colours within; the stucco-work of the colonnade hung like a veil of lace let down from heaven. It was a jewel stolen from the Arabian Nights, a jewel iridescent as an opal which caught its vibrations of colour from the delicate tints of the richly clothed Arabs and Moors who were strolling about, document in hand, awaiting their turn . .

“I was standing just inside the wide open door thinking these thoughts, for you must not imagine that this solemn little court had seats for the curious, as our London law-courts have. No one was admitted into its sacred precincts but the three judges and the *Sheik-ul-Islam*, who sat apart in this holy of holies, and the four or five people connected with the case.

“At last the judge before whom Madame Ajeeb was standing said something which made Monsieur Ajeeb motion to her to pass along to where the *Sheik-ul-Islam* was seated. . . . .



## 7. *The Judiciary*

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Not a muscle of his face moved nor a fold of his flowing salmon-tinted robes stirred, and not for one instant did he raise his eyes from the parchment he held in his beautiful hands. The perfect calm of his attitude suggested the repose of a Buddha. You felt instinctively that the judgment of this representative of Mohammed would be a just judgment—the dignity of his features, with their superb expression of indifference, set him far above all briberies or petty partiality. Here was a great man so far removed from the common herd that he must have impressed even the most unimpressible. Justice seemed to emanate from every fold of his softly falling robe and to lie concealed in each roll of his prophetic turban.

. . . . . "Suddenly he also raised his head from the document he was studying and fixed his far-seeing eyes full on the face of the Englishwoman in front of him. . . . . Still gazing at Sylvia, just as the man of the desert had gazed at her, and as though he could read on the whiteness of her soul all the thoughts that Allah alone knows, he suddenly asked first Monsieur Ajeeb and then his lawyer a few brief questions. Then twice he addressed Sylvia, prefacing all his questions with the familiar word 'Bismillah!' (In the name of the Lord; this sentence begins every written document and is the opening sentence of every Mohammedan book). . . . . Apparently her answers satisfied the sheik, for he held up his hand as a signal for dismissal; the case was finished. . . . . I wish I could have understood what the sheik said to Monsieur Ajeeb, for I am sure he gave him a grave admonition. To Sylvia he gave his blessing, for I caught the words 'Selam-a'-Alek!'—"The peace (of Allah) be with thee'."

The "mufti", or counsellor, plays a part closely analogous to that of the jurisconsult in classic Rome and in the Romanesque system of the Renaissance,—the role



## IX. Mohammedan Legal System

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made familiar to us by Portia in Shakespeare's "Merchant of Venice". Though the judge relies upon and adopts one or another of the counsellors' opinions, and though those published opinions (of eminent counsellors) have served as an important source in developing the law, yet the counsellor is sought by the party (rarely by the judge); each party retains and fees a counsellor; and the "futawa", or opinions (if vouchsafed), take the place of the American brief. The opinion is given in writing and presents the arguments in the client's favor. This opinion will be in turn criticized by the opponent's counsellor's opinion. In a case of importance, those briefs and reply-briefs may mount up into dozens.

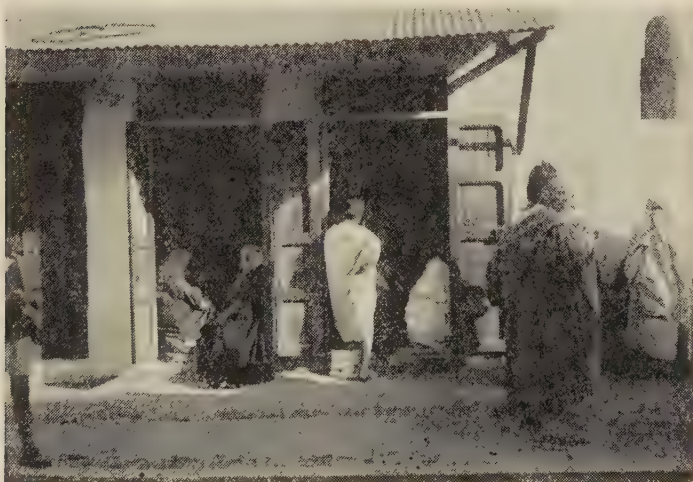
Although the kadi in Persia might be found acting as notary (*ante*, par. 5), yet in the other Islamic regions, and normally, the notary was a distinct officer (as in the Romanesque countries), the "adal" (or "adul"). His function is thus described by Ibn Khaldoun, a jurist who had lived in many Islamic regions,<sup>mm</sup> and in any modern Islamic city the aduls can still be seen officiating as Ibn Khaldoun described them six centuries ago:<sup>21a, 21b</sup>

"The adal is under the kadi. He serves as witness [i.e. notary] to the transactions of parties, by assisting



IX. 21a—ENTRANCE TO THE KADI'S COURTYARD AT CASABLANCA,  
MOROCCO

The offices of the counsellors, known here as aduls, when they act  
as notaries and drafters of pleadings, are seen at  
right and left of the entrance.



IX. 21b—OFFICES OF THE ADULS

Clients consulting the aduls before going to court, Casablanca,  
Morocco.

## *IX. Mohammedan Legal System*

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them in the preparation of instruments, by bearing testimony in court whenever a dispute arises, and by entering in his record their titles, their securities, and their settlements, so as to assure the preservation of their rights. To merit appointment to this office, the incumbent must be upright beyond reproach and must be skilled in the drafting of documents, not only as to words and syntax but also as to the forms required by law for all kinds of instruments, and therefore also as to the law of those subjects. Because of these requirements, the office is conferred only upon persons of recognized probity. Their duties are of great importance for the kadi, because only by the assistance of the adal can the kadi know what witnesses and documents can be trusted when produced before him. . . . . In all the large cities there are alcoves or benches on the public way where they are seated ready to lend their services to all those who desire the certification and recording of their transactions”.

The status of the counsellor, as well as that of the adal (who often as notary gives the legal advice that an Occidental attorney might give), is still held in great honor among Islamic peoples; and the following passage of a modern American traveler sketches his

## 7. *The Judiciary*

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impressions of the Street of Aduls, the Inns of Court of Tetuan in Morocco:"

"It contained about one hundred cubby-hole offices, open to the street, in which were seated cross-legged the learned men of the law;—all very aged and venerable, with snowy white beard. Clients thronged around one interesting personage, with snow-white head, eyebrows like ermine tufts, gold-rimmed spectacles, and white silk robe. His little office was crammed to overflowing with ponderous manuscripts. Four clients stood waiting patiently, while he perused his commentaries. Finally he attended to the first, a woman. He refused her first retainer; then she offered a larger one. Then he listened, took notes, referred to his books, and told her she had no case. The woman was angry, and demanded the return of the fee. All the passers-by stopped and took part in the argument."

8. The system of legal education and of judiciary organization, just described, dates back, for its beginnings, as early as the second century after Mohammed's death, under Harun-ar-Rashid, the ruler so often mentioned in the Arabian Nights. But it was perfected, for the Ottoman Empire, about A. D. 1500, under Suleiman the Magnificent,—the contemporary of the Emperor Charles V, and of Elizabeth of England. Suleiman was known in the Orient as El Canouni, the Legislator; he has been termed by historians the Justinian of Islam. Advised by the far-seeing Counsellor Abu Suyudi, he presided over

## *IX. Mohammedan Legal System*

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the great task of organizing and adapting Mohammedan law to the needs of the various regions in the new and vast Turkish empire. He was the patron of all the arts, and under him Islamic architecture reached its zenith. He it was who built the Suleimanye Mosque at Stamboul. The Church of Santa Sofia, when Justinian dedicated it A. D. 537, had till then been deemed the greatest work ever completed by architects; Justinian, when he entered it, exclaimed, "Solomon, I have surpassed thee!" But Suleiman said, "I will surpass even the Christian Emperor's work!" The Suleimanye Mosque was his challenge. And the Suleimanye University was his special achievement for the law. By his order, the adjacent court-yards of the mosque became the graduate school for all the other universities.<sup>22</sup> The highest judicial officers in the Ottoman Empire must be graduates of the Suleimanye; and the office of the Shaikh-ul-Islam, the chief of the entire juristic body, was in the northeast corner of this court-yard. It was a brilliant century in Christian Europe; but an Italian traveler of that day at Stamboul is recorded as saying, "One would be very fortunate in Europe if one could appeal from our courts to the Sultan's Supreme Court."

But this system of legal education was not peculiar to Stamboul; it extended to every corner of the Islamic





IX. 22—SULEIMANYE MOSQUE AND UNIVERSITY

Here was held the final course of instruction in Islamic law for the Ottoman Empire

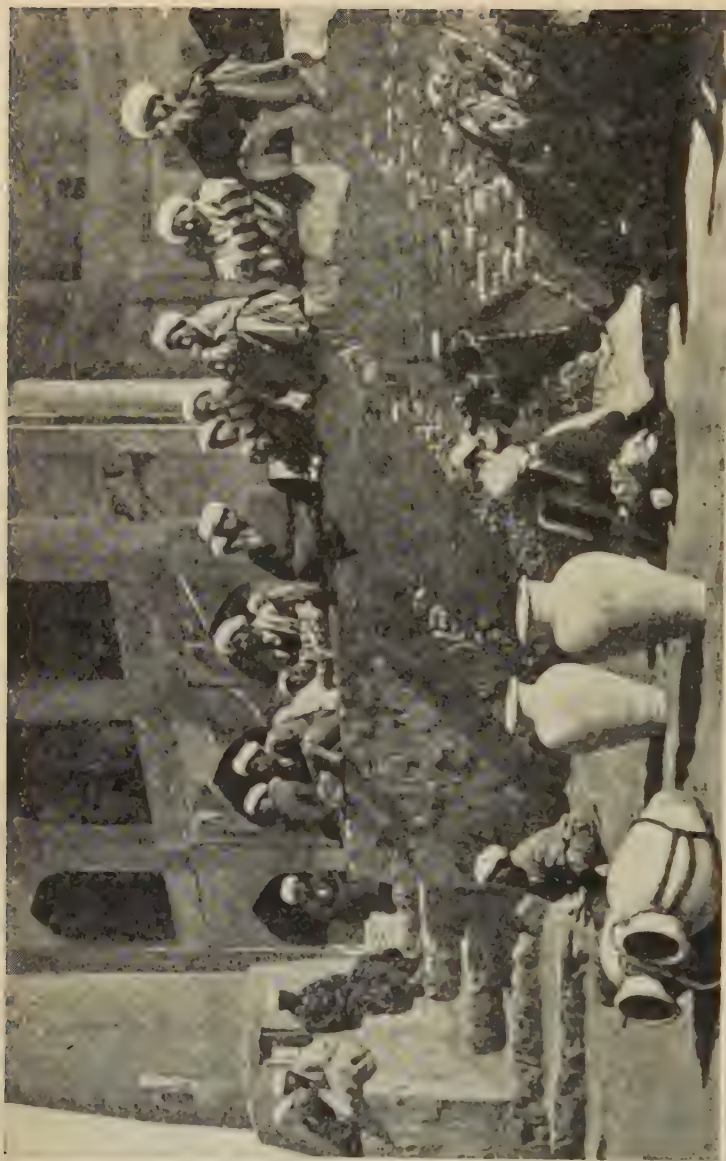


## 8. *Legal Education*

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world. Endowed colleges, or “medresseh”, had been founded by all the zealous Sultans, Khalifs, or Shahs, in every country. In Persia, for example, at Isfahan, the College of Hussein was one of the finest in Asia. Under the celebrated Sultan Saladin, the chivalrous opponent of the Crusaders in the 1100’s, the medresseh, or college, gave rise to a new style of interior architecture, the educational mosque. The central nave was square, and on each of the four sides was a large transept for the professors and their classes,—one transept for each of the four principal sects. There were also a variety of lecture-rooms, libraries, laboratories, between the transepts and the outer walls, and often lodgings for professors and students. In the city of Bokhara, in far Turkestan, one of the world’s great religious centres, there are today nearly four hundred mosques, with over one hundred colleges attached,<sup>23</sup> and jurisprudence is the highest stage of their studies. The principal college at Bokhara is that founded by the Khan Abdul Aziz. Each student has a monastic cell to himself; and some students, it is said, have remained there for 30 or 40 years.

But the largest and most famous of these colleges is the one attached to the Mosque El Azhar (which means “the Resplendent”) at Cairo. This is the oldest extant university in the world; it was founded A. D. 970, by the



IX. 23—ABDUL AZIZ COLLEGE, IN BOKHARA  
There are over one hundred colleges in Bokhara

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Khalif El-Mohizz. Its students, formerly 10,000, still number 5000, and there are three hundred professors. It is open to the poorest, without a penny of charge, and without distinction as to caste or race,—a noble example of free education. Even the professors lecture without fees; they eke out a living by private tuition and by copying manuscripts. The students here come from all regions of the faith,—from the African West Coast to the Malay East Indies, each nation having its own portico in the arcade.<sup>24</sup> The most eminent jurists of the Islamic world are found here; and most of the Arabic treatises on law are now printed in Cairo; for Cairo, since some generations past, has become the successor of Damascus, Bagdad, Cordoba, and Stamboul, as the centre of Islam's intellectual activity.

9. In the presence of a system like the Mohammedan, so different in spirit and sources from the other two world-systems, accepted only by Asiatic and African peoples, blossoming precociously a thousand years ago yet surviving actively in today's justice, a lawyer may naturally seek to understand its practical operation more concretely than is to be gleaned from a mere narrative of its sources and organization. Let us, therefore, take a specific example of a modern litigation and peruse the original papers. The following record of a modern law-





IX. 24—EL AZHAR COLLEGE, IN CAIRO

The oldest university in the world. Some ten thousand students attend, taught by three hundred professors

## 9. *A Modern Lawsuit*

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suit (1915-1917) in French Morocco will serve to illustrate some of the foregoing features of the Mohammedan legal system at its best,—the judiciary organization, the careful documentation, the system of proof in judicial proceedings, the part played by the counsellors, the use of authority and precedent in argument and in decisions, and the theoretically religious background of its legal principles.

In this case of *Abd-al-Kader v. Mohammed* the plaintiffs, as heirs entitled to share, ask for the partition of an estate which has remained for forty years in the hands of some other heirs; the parties are all descendants of one Bu Salham, deceased, and his name is borne by some of the heirs. The principles of law invoked need not here be explained; except to note that the main controversy, viz., the probative effect of a “lafif”, or inquest of neighborhood repute, concerns a mode of proof peculiar now-a-days to Morocco but evolved from an earlier type, and closely analogous to the old French “enquête par turbe”, which was once first cousin to the English jury.

In the record as here translated<sup>o</sup> are given the complaint (with accessory documents), the answer, the evidence, the arguments, and the judgment; afterwards the appellate opinion on a similar point of law in another case.

## *IX. Mohammedan Legal System*

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The judgment of the trial court (document No. 11) gives a clear summary of the proceedings.

First come the Plaintiffs' Appointment of their Attorney, the Plaintiffs' Statement of Claim, and its service on the defendants:<sup>25</sup>

[1. *Power of Attorney.*] "Power of attorney given to Mohammed ben Ahmad ben Sliman by Aisha bent al-Yamani al-Borjali, wife of Bu Salham ben al-Jilani at-Tazuthi, and their son Abd al-Kader, to enter suit for the estate of the said Bu Salham, to take possession of the said estate, to act in making all proofs, partitions, sales of realty or personalty, to receive payments and give discharges, to file all pleadings, and to make all acknowledgments, refusals, and settlements. A full power, without limit of time, 13th of Moharram, year 1334 [1916]. [Sign-manual of notaries.] [Sign-manual of two judges.]"

[2. *Statement of Claim.*] "Mohammed ben Ahmad ben Sliman, native of Tunis, resident at the town of Sale, acting in the name of Abd al-Kader ben Bu Salham at-Tazuthi, of Sale, and his mother Aisha bent al-Yamani, of the same family, sets forth: That his principals are heirs of al-Yamani, of Bu Salham, and of Rahma, children of Bu Salham at-Tazuthi. The estate of their ancestor consisted of the following: 1 tent and accessories, 40 cattle, 100 sheep, 3 mares, 2 horses, 4 asses, 2 mules, a garden at Ulad Borjal bounded as follows [describing it], a plot of land at the same place known as Hamri, bounded as follows [describing it], and another plot of land at the same place, known as Davdat, bounded as follows [describing it]. The whole estate was taken into possession by Said [another son of the elder] Bu Salham and on Said's decease, by his children, Mohammed, al-Miludi and Mansur. The principals now claim partition of this estate, together with the product and increase of the animals and the fruits of the land since the decease of





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the said Bu Salham some 40 years ago. Signed this 6th day of Safar, year 1335 [Dec. 2, 1916]. [Signs-manual of the notaries and the judge.]”

[3. *Service on Defendant.*] “At-Thahar ben al-Akrishi, attorney for the defendant Mohammad ben Said, acknowledges a copy of the statement herewith. Three days given him for filing answer. 9th Safar, year 1335. [Signs-manual of the notaries and the judge.]”

Next comes the Plaintiffs’ Preliminary Proof of Heirship, the Defendant’s Denial, the Judge’s Order to make further Proof, and the Plaintiffs’ Further Proof:

[4. *Plaintiffs’ Preliminary Proof of Heirship.*] “The witnesses whose names follow attest that they know Bu Salham ben al-Jilani, native of Tazutha, living at Ulad Borjal; that at his death he left as heirs his wife Aisha bent al-Yamani al-Borjali and children by her [1] Abd al-Kader [the plaintiff], [2] al-Yamani, [3] Bu Salham, [4] Rahma, and children by another woman, [5] Mohammad, [6] Said, [7] Allal, and [8] al-Bahlul; that [3] the son Bu Salham died leaving as heirs his mother Aisha above named and the three brothers and sister above-named; that [4] the daughter Rahma died leaving as heirs her mother Aisha and her two brothers above-named; that [2] al-Yamani died leaving as heirs [the plaintiffs] his mother Aisha and his brother Abd al-Kader; that [7] Allal died leaving as heirs his wife Aisha bent Salham at-Tazuthi, a daughter Fatima by another woman, and his brothers Mohammad, Said, and al-Bahlul; that [5] Mohammad died leaving as heirs his two daughters Zahra and Aisha and his two brothers al-Bahlul and Said; that [8] al-Bahlul died leaving as heirs his wife Halima bent al-Hamawi as-Sbihi and his children by her, Bu Salham, Abu-l-Kheir, Mohammad, Gomra, Thamui; that Aisha died leaving as heirs her sister Zahra and her uncle [6] Said; that Said died leaving as heirs his three wives, Um al-Kheir bent Azuz as-Sbihi, Mira bent Said bent Thaleb al Borjali, and Amina bent Bou Azza as-Sahli, also the



## 9. *A Modern Lawsuit*

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children of the first-named wife, viz., two sons [the defendants], Mohammad and al-Miludi, and two daughters Amina and Rahma, also the child Ben-Mansur [a defendant] of his second wife Mira above-named.

“The witnesses affirm that there are no other heirs than those above-named. 30th day of Rabi, year 1334. [Follow the names, in the form given in No. 6 below, of twelve witnesses, the signs-manual of the notaries, and the seals and attestations of two successive judges.]”

[5. *Defendant's Denial, and Judge's Order to Make Proof.*]

[a] “The foregoing statement of claim having been read in the presence of at-Thahar ben Mohammad al-Akrishi, attorney for [the defendant] Mohammad ben Said al-Borjali, the said Mohammad answers by denying. 13th of Safar, year 1335. Copy delivered the same day. [Signs-manual of the notaries, and of the judge and his successor.]”

[b] [Copy of the answer in denial of the same statement of claim, made by the same attorney in the name of the defendants al-Miludi and Mansur, 21st Safar, year 1335.] [Copy delivered the same day. Signs-manual of the notaries].

[c] “The plaintiffs’ attorney Mohammad ben Ahmad ben Sliman having proved the death of [the intestate] Bu Salham al-Tazuthi, and described his estate, is to prove the facts alleged by him in the statement of claim, which are denied by the defendants. 23d Safar, year 1335. [Signs-manual of the notaries, and of the judge and his successor.]”

[6. *Plaintiffs' Further Proof.*] “Praise to God! The witnesses whose names appear below in this document affirm that they knew, well enough to satisfy the law, Bu Salham ben al-Jilani, of Tazutha, residing at Ulad Borjal; that upon his death he left in the hands of his son Said, whom they know as well as they knew the father, the

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following: 1 tent and accessories, 40 cattle, 100 sheep, 3 mares, 2 horses, 2 mules, 4 asses, a garden, a plot of land known as Hamri, another plot of land known as Davdat,—the whole located at Ulad Borjal; that on his death the aforesaid Said left the whole in the hands of his two sons Mohammad and al-Miludi, whom the witnesses know as well as is stated above; that they are certain of the above facts, and that this knowledge is based on information acquired by living in the vicinity and acquaintance with the parties. 6th of Rabi, year 1335. [Follow the names and description of twelve witnesses.] Praise to God! The above sworn to before the magistrate [Signs-manual.] Praise to God! The eminent learned and wise doctor of law, whose wisdom is of great esteem, Ali at-Tagrawi, whom may God (whose name be revered!) render worthy of respect for his obedience, now sitting as judge at Sale (and may God keep him and his jurisdiction!) attests the genuineness of this instrument and records it to give effect in law, doing this by authority of his office, and may his generosity and prosperity endure without end. 9th of Rabi, year 1335. [Signs-manual of the two notaries.]”

[*Confirmation of the Foregoing.*] “Praise to God! By order of the learned jurist and eminent doctor Abu-l-Hasan (whom may God render worthy of respect for his obedience!), judge at Sale (whom may God preserve, as well as his jurisdiction!), the witnesses in the annexed document have been questioned as to the testimony purporting to have been given by them, so as to learn how they came to testify and on what knowledge their testimony was based. Each one, questioned by himself, answered, sentence by sentence, as recorded herewith, without addition or diminution. Questions and answers approved, correctly transcribed, authenticated, and filed. 8th of Rabi, year 1335. [Signs-manual of notaries and judge.]”

Next come the Judge’s Order Assigning Time for Reply, and the Defendant’s Bond to release the interim Attachment:

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[7. *Judge's Order Assigning Time for Reply.*] "The attorney Mohammad ben Ahmad ben Sliman has produced a document tending to prove the facts alleged in the statement of claim. The judge has notified the [defendant's] attorney at-Thahar al-Akrishi, with copy of the document, of his opportunity to rebut. The said attorney has given bond to execute any judgment that may be rendered. The judge assigns to the defendant's attorney at-Thahar al-Akrishi one month to answer the said proof. 28th of Rabi, year 1335. [Names of the two notaries. Sign-manual of the judge Ali at-Tagrawi.] Copy delivered 29th Rabi, 1335."

[8. *Bond to Release Attachment.*] "Praise to God! The honorable merchant Thaleb al-Haj Mohammad al-Basha, of Rabat, acknowledges that he is surety to the attorney Mohammad ben Ahmad ben Sliman for all liability that may be adjudged against the defendant Mohammed ben Said al Borjali at the expiration of the time allowed by the court for answer in the suit now pending between the parties, this bond to be a valid lien on all his property, freely consented to. Acknowledged before witnesses, at request of the parties, proving competency and identity, 28th of Rabi, year 1335. [Signatures] Praise to God! Filed [judge's sign-manual]. Praise to God! Certified to be of record [another judge's sign-manual]."

In the meantime, some of the witnesses recorded as joining in the inquest had denied taking part in it:

[9. *Repudiation by Certain Witnesses.*] "The six persons whose names follow affirm that they know [the plaintiff] Abd al-Kader ben Bu Salham al-Borjali of Tazutha, but that they never knew his father, nor what estate was left by him, and that they never gave any testimony on this subject [as in No. 4 above]. The first-named adds that during the past three years he never has been at Sale, nor the second named for two years past. [Names of the six. Signs-manual of the judge at Kenitra, and of the notaries.]"

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This denial led to the main dispute of law; on which the following opinions were now secured by the respective parties:

[10. *Opinions, or Briefs, of Counsellors.*] [a] "*Opinion [for the Defendant] of Al-Jilani ben Ahmad ben Ibrahim, of Rabat.* The inquest of neighborhood repute, copy annexed hereto [No. 4 above], offered to prove the death of Bu Salham ben al-Jilani and the property of his estate, is marked by improbabilities. In the first place, it is difficult to believe that any twelve persons could all have known nine other persons, dying one after the other, with their wives and children. In the second place, four witnesses have recanted their testimony; one even affirms that he had never been at Sale for some years and therefore could not have given testimony there at the date named. Now, an inquest thus defective is void. Authorities: the Miyar of the jurist Wancharisi [about A. D. 1500], the Tabsira of the jurist Farhun [about A. D. 1400], and the Tohfa of the jurist Hasim [about A. D. 1400] [giving citations]."

[b] "*Opinion [for the plaintiff] of Al-Hashmi ben Kadra.* (1) The document annexed in copy herewith, proving the death of the ancestor and the list of his properties, is valid and sufficient proof in law; for it contains all necessary elements, viz., knowledge of the fact of decease, knowledge of the specific properties, and the oath of the witnesses. The inquest is indeed not accompanied by a confirmation after separate questioning [as was No. 6 above], which is designed to verify the testimony. But the precedents show that such a proceeding of confirmation is not necessary after the lapse of six months; see the Amal of al-Fasi [a jurist of about A. D. 1680.] Moreover, this inquest contains nothing improbable. It is not improbable that persons of the same tribe and locality should know about the deaths of nine persons occurring at not long intervals. (2) The document produced in support of the allegations of claim [No. 6 above] is equally valid. The repudiation by several witnesses

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is not to be credited. And to deny having deposed is not to retract a deposition once made. It is not correct to hold that if one of the witnesses joining in an inquest fails, the inquest is void. The number required by precedent is twelve; six witnesses in an inquest being equivalent to one regular witness [and two regular witnesses usually suffice]. See the Amal of al-Fasi, citing the opinion of the jurist of Fez, Abu Abdallah Mohammad Ibn Jilal al-Kabir [about A.D. 1580]. (3) It cannot be required that this inquest fulfil the strict requirements for proof of title [by deed]; the present claim is not one of title by deed, but of inheritance by kinship. (4) As to the boundaries given for the garden and the plots of land, they can readily be described more accurately, either by the same witnesses or by others."

### [c] *Reply-Opinions [for the Defendant]*

"*Opinion of Al-Jilani ben Ahmad ben Ibrahim, of Rabat.* Praise to God, who has made knowledge the lamp to guide our feet, and may blessings light upon our prophet Mohammad, his family and his disciples. The inquest of neighborhood repute, copy annexed hereto [No. 6], reciting that at the death of Bu Salham of Tazutha his estate came into the hands of his son Said named therein, and enumerating 1 tent with accessories, etc., etc., is contradicted by eight witnesses, who deny having given such testimony. One of them adds that he has never even been at Sale for several years past, and therefore never gave such testimony, either before the officials therein named or any others. This fact is proved by two documents annexed hereto. Now since the majority of the witnesses have repudiated their testimony, and only four adhere to it, the inquest is void in law. It is said in the Miyar al-Jadid [dating about 1900] by the jurist al-Wazzani (whom God preserve!): 'The following question was put to the jurist Abu-l-Hasan Ali ben Kasim ben Kaju [living about A. D. 1550]: "The witnesses to an inquest of neighborhood repute, on being separately questioned, contradict each other and the majority or the minority of them retract their testimony;



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should full evidential force be given to the oaths of the others? The judge Musa as-Sidi, while he was judge at Tetuan, held that proof by inquest is ineffective if a single witness retracts; much more so, then, if more than one retracts; and I need bring no other citations to that effect. I ask your worship for a clear answer on this point." He answered: "The principle is that the only testimony acceptable as legal proof is that of a certificate by two notaries, whose standing is unblemished; for the word of God says, Take for witnesses those of you whose standing is unblemished"; see the verse. But necessity has compelled us to accept other testimonies as equivalent to the notaries' certificate. The number of such other witnesses in practice (God knows best!) is twelve, and this is the lowest number allowable for such witnesses swearing together. If one of these twelve fails, the indispensable number is lacking, the remaining ones are ineffective, and the principle of proof is not satisfied. God knows best!—To sum up: The majority of the witnesses having retracted, and formally repudiated their testimony, and the only remaining testimonies being a minority, the inquest has no probative value. Opinion by the humble sinner al-Jilani ben Ahmad ben Ibrahim, of Rabat, to whom may God be merciful!"

*"Opinion [for the Defendant] of Abdar-Rahman ben Nasir Brithil.<sup>26</sup> Praise to God [etc., as above]. I add that the answer given by the foregoing counsellor (whom God preserve!), as to the inquest by neighborhood repute, declaring it to be void and of no value, is entirely sound; for the denial of the eight witnesses that they made oath is equivalent to a retraction. The jurist Ibn Abu-l-Kasim as-Sijilmasi [about A. D. 1780] was once inquired of on a case which elicited this answer: 'The fact stated that the witnesses, named in the document annexed, denied having given testimony in the inquest copied herewith, suffices to annul the said inquest and to deprive it of probative value. It is said in the Miyar [dating about 1500]*



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that the witnesses' denial of the very fact of testifying is equivalent to a retractation. Now the retractation of a testimony before it has been acted on by the judge nullifies the testimony. This principle is unquestioned.' The above answer is recorded by the jurist Al-Wazzani in his collection of opinions [about A. D. 1900] known as Al-Kobra. Now since eight of the testimonies are void, there remain but four; and the precedents require twelve in such cases,—never less. Ibrahim al-Jilali was asked, as to the number of witnesses in an inquest, whether it was valid if only one notary and six ordinary witnesses joined; he answered: 'The lowest number required by the precedents is twelve; six ordinary witnesses are equivalent to a second notary. Such was the practice at Fez in the days of the masters who are our guides.' This text is found in the commentary on the Amal of Al-Fasi [about A. D. 1680].—Other reasons for holding valueless this inquest are its obscurity and inaccuracy. Its purpose is to prove the allegation of the attorney for the plaintiffs that Bu Salham owned the tent and other property and that he left it all in the hands of his son Said. Now the inquest, in point of proof, does not satisfy the rule for proof of property as laid down in the Lamiya [by Abu-l-Hasan, about A. D. 1500]: 'Possession under color of title for a certain period, such as ten months, and undisputed, raises a presumption of ownership'. And Abu-l-Hasan (citing authority) said that 'witnesses before testifying must show that they have knowledge (which few do have) of the material facts; otherwise, their testimony cannot be received'. Note also that 'furnishings and accessories', as stated in the inquest, and other expressions, are too indefinite.

"To sum up: The inquest in this case is void in law, for the reasons above stated, and proves nothing.—Opinion written by the servant of God Abd ar-Rahman ben Nasir Brithil, on whom may God have mercy. Amen.—End of the copy; compared with the original and found correct."

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[d] "*Opinion [for the Plaintiff] of Mohammad at-Thiyyib an-Nasiri.*"<sup>27</sup>

"Summary. The arguments in the foregoing opinions are unsound. (1) The inquest proving the fact of death and the list of heirs [No. 4, *ante*] has nothing improbable in it. It is quite natural that even after forty years persons of the same district, place, and tribe should still have knowledge of such matters and be able to make oath to them. Moreover, the witnesses are all between sixty and seventy years of age. (2) It is not correct to maintain that a denial of the fact of testifying is equivalent to a retractation. The analogy is not sound, without authority to support it; and the authority is the other way. It is said in the *Dur-an-Nathir*: 'According to Al-Mazari [about A. D. 1136] if a judge certifies that a witness deposed before him and the latter denies this, the denial will not be credited'. So too Ibn Hilal [about A. D. 1050] says that a denial of the fact of testifying, after judgment rendered, is not a ground for setting aside the judgment. (3) The inquest is not offered to prove ownership, but to prove relationship as next of kin. —Signed, Mohammad at-Thiyyib an-Nasiri."

Then comes the Judgment of the Court:

[11. *Judgment.*] "Judgment of the Kadi of Sale, 17th of Shawal, year 1335 [Aug. 6, 1927].

"Praise to the one God! Mohammad ben Ahmad ben Sliman at-Tunsi, acting for Abd al-Kader ben Bu Salham at-Tazuthi as-Slawi and his mother Aisha bent al-Yamani, of the same place, by virtue of a power of attorney, being document No. 10 in this record, has brought suit on behalf of his clients to the inheritance of Al-Yamani, of Bu Salham, and of Rahma, children of one Bu Salham, claiming their share in the latter's estate, to wit . . . [here the judgment recites with particularity the goods and lands forming the estate]; alleging that the whole remained in the hands of Said ben Bu Salham [a son of the original Bu Salham], that on the death of







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Said, the whole came to the hands of [the defendants] his children Mohammad, Al-Miludi, and Mansur; and asking that the property be sequestered, and that pursuant to law a partition be made of the estate and an allotment of the profits and increase thereof accruing since the death of Bu Salham al-Jilani some forty years ago; the foregoing claim contained in the statement of claim dated 6th Safar 1335, being document No. 8 in this record.

"The attorney for the plaintiffs proved the death, first, of Bu Salham ben al-Jilani, and then of his children al-Yamani, Bu Salham, Rahma, and Said, and the list of his properties, as set forth in document No. 9 herewith.

"The attorney at-Thahar al-Akrishi, in the name of the defendant Mohammad (the latter acting under a power given by the defendants al-Miludi and Mansur, as set forth in documents Nos. 1, 3, and 4, copied in file No. 8 herewith), replied to all the allegations in the statement of claim by denying them, as shown in the two entries indorsed on the said complaint.

"The attorney for the plaintiffs produced a document proving the allegations as to heirship, being document No. 5 herewith. The period of the defendants' enjoyment of the fruits and profits of the estate, as alleged in the statement of claim, was proved by the admission of the defendants' attorney made at the hearing, viz., that Bu Salham ben al-Jilani, the first ancestor deceased, died about forty years ago, as alleged in the statement of claim.

"Furthermore, the furnishing of the tent, with its usual accessories, was proved by two experts, Abu ben Hamman al-Amri al-Muslimi and Ahmad ben Mathala al-Amri al-Ayyadi, who are known by sight and by name to the two notaries and whose families are also known to them. The said experts testified before the magistrate (whom may God direct aright!) in the presence of the two said notaries, that by custom of the nomad Bedwins a tent and its accessories include two camping sacks, skin cushions with wool

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filling (spun or otherwise), one wooden platter, one pitcher, one brass pot, some small jars, sieves, bowls, one woolen coverlet, one bed and accessories, cloth tent-doors, mats, a rug, and a kettle. These testimonies were based on an average custom and reasonable sizes.

"The magistrate then called upon the attorney for the defendants to present proof and arguments, and assigned one month's time for this purpose, requiring first a bond to execute any judgment, as shown by indorsement on document No. 7 herewith. The said bond was duly filed as shown in document No. 11 herewith. At the expiration of this period, the attorney for the plaintiffs produced a document showing the boundaries of the garden and the plots of land, supplementing the description given in the statement of claim.

"The magistrate (whom may God direct aright!) then called upon the attorney for the defendants to present any objections and evidence, and to take copy of the above documents, as shown in document No. 1 herewith; but the said attorney advanced no valid objection, and the assigned times expired without the defendants having produced any material evidence or argument.

"The magistrate, being the wise and eminent jurist who is judge at Sale (whom may God render worthy of respect for his obedience!), now enters judgment against at-Thahar al-Akrishi, attorney for the defendant, and Mohammad his principal, and orders that they deliver to the plaintiffs, Abd al-Kader and his mother Aisha, the share due to the latter in the estate of al-Yamani, Bu Salham, and Rahma, by virtue of their rights in the estate of their said father Bu Salham al-Jilani, consisting in the properties described in the statement of claim.

"This judgment is founded on the opinions given by the counsellors as to the proofs of succession produced to support the statement of claim; said opinions, contained in document No. 2 herewith, set forth correct principles and are founded on the authorities.

## 9. *A Modern Lawsuit*

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“Likewise, the magistrate (may God guide him aright!) adjudges that at-Thahar and his principal Mohammad deliver to the plaintiffs the due share in the fruits, profits and increase of animals and lands during the period aforesaid.

“This judgment is entered after calling upon the defendants in due form, ‘Have you anything else material to say?’, and receiving a negative answer, being an admission that they are unable to refute the proof made by the plaintiffs and that the date of the death of Bu Salham the first deceased ancestor was about forty years ago as alleged.

“Final judgment to be executed.

“Entered in court before competent witnesses. this 17th of Shawal year 1335. [Signs-manual of two notaries and the judge of Sale.]”

The following opinion on appeal serves to complete the picture; for though it was rendered in another lawsuit three years earlier, it deals with the same principle of law and well illustrates the use of authorities and precedents by the Court of Appeal; note that the citations range from jurists of seven centuries ago down to the latest modern commentaries, and that no statute is cited:

[12. *Opinion of the Court of Appeals.*] “Decision given on the 26th of Shaban year 1332 [July 20, 1914] by the Minister of Justice and the Court of Appeal in the case of Ibrahim Burekka’s Heirs against Ahmad ben Bu Azza ash-Shahlawi.

“The attorney for the heirs of Ibrahim Burekka alleged that Squire Ahmad ben Bu Azza ash-Shahlawi, known as ‘the American’, dispossessed the said heirs, his principals, of two parcels of land, known respectively as Faddan al-Kabir and Katha-hat at-Twirs, described in the statement of claim; that he refused to make redress;

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that his principals had duly made proof of the wrong; that due notice of this proof was served; and that the two parcels have been sequestered pending further proceedings. The judge at Safi, after hearing the parties, awarded the two said parcels to Burekka's heirs and adjudged that they be put in possession as of the date of the judgment, ordering the defendant ben Bu Azza to surrender possession, to restore the fruits received during the period of disseisin, and to reimburse the expenses incurred by plaintiffs from date of disseisin to date of judgment. The judgment recited that the defendant Ahmad ben Bu Azza had failed to make any valid defense, and relied on two opinions filed by counsellors of Marrakeesh.

"On date of 2d of Jumada, year 1332, the defendant Ash-Shahlawi filed an appeal against this judgment. The parties argued before the Court of Appeal, consisting of the learned jurist Mulay Ahmad ben Mamun al-Belghithi, member of the Council, and the learned jurists Ali at-Tagrawi and at-Thaleb Manino, deputy members sitting in place of two other judges disqualified. The Court of Appeal concluded its deliberations in the middle of the month Shaban year 1332, and came to the conclusion that the judgment taking these two parcels from the disseisor and ordering him to restore the fruits received during his disseisin, was correct, even though neither the decision, nor the opinions [briefs] on which it was based, sufficiently set forth the principles leading to the repudiation of the arguments of the defeated party, viz., Ash-Shahlawi.

"It is therefore necessary to state those principles.

"The heirs of Burekka produced (1) a deed, purporting to sell to their ancestor the land in question, by Ahmad 'the American' and the other heirs of his father; (2) a certificate by two notaries finding the disseisin of the said land by the said Ahmad and his unlawful tilling of it. The American produced (1) an inquest of neighborhood repute attesting continuous ownership by his father and heirs; but these witnesses stated that they knew nothing of a sale by one of the heirs; (2) copy of a deed of partition of the father's estate,

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executed by the defendant and his co-heirs, by which the parcels in issue were allotted to certain of them; (3) depositions showing that defendant was absent elsewhere at the time of the alleged sale.

“After consideration of these documents, this court (whom may God aid and keep!) is of the opinion that Ahmad undoubtedly with his co-heirs, did make the sale, and that the deed of sale is not overthrown by the testimony to continuous ownership.

[1] “This latter document states that the witnesses knew nothing of a sale. But their ignorance of a legal transaction does not raise the necessary inference that the transaction did not take place. Many acts are done for which there are no witnesses. In this case the fact of sale is proved by the formal document certified by two notaries. It is not a case falling within the principles that govern two conflicting testimonies. Such is the view of Ad-Dardiri [about A. D. 1780] and of his commentator Ad-Dasuki [about A. D. 1800], and it is equally in accord with At-Tasuli in his commentary on Az-Zakkak [about A. D. 1500]. There could only be conflict of testimonies if the witnesses had positively contradicted each other on the fact of disposing of the property. Supposing that there had been competent witnesses for the defendant denying the sale, then and then only would the question of choosing between them be presented.

[2] “It is well settled in the law that testimony to an affirmative fact outweighs testimony to a negative fact; and here the plaintiffs’ testimony affirms the sale. Az-Zakkak says, ‘Testimony to a sale of property outweighs the presumption of continuance of a state of facts’. So that the notarial document reciting the presence of the vendor at the sale must prevail over the testimony to the vendor’s absence. It is said by Khalil [the great authority quoted *ante*, p. 555], ‘The greater trustworthiness of witnesses, not the greater number, is a ground for decision’; and the more so here as the recital in the deed tends to affirm the fact of the sale, while the testimony of the witnesses to the vendor’s absence tends to negative it; for in



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such case testimony to a positive fact prevails over testimony to a negative one. In a comment on the topic of Khalil, 'in a case of anathema, or of paternity attributed by a Moroccan to a Levantine', Az-Zarkani [about A. D. 1700] said: 'If a party produces testimony that a named man at a certain time killed another, and the other party produces testimony that the same person at the same time was seen at another place at a distance, the testimony to the fact of killing will prevail, because it is an affirmative fact'; and he adds, later on, 'The testimony to the killing will prevail only if the witnesses to the alibi are not numerous enough to give their testimony an indisputable effect.' Now in this case the twelve inquest-witnesses cannot be considered numerous enough to have that effect, because they count only for two notaries [and the plaintiffs' certificate was made by two notaries]. Hence, the two notaries prevail, because of their higher trustworthiness; pursuant to the above quoted maxim of Khalil, that 'the degree of trustworthiness, not the number of witnesses, is a ground for decision'. The jurist Al-Hatthab (about A. D. 1550), commenting on Khalil's passage about reconciling contradictions, says, 'If witnesses affirm that a person made an admission in their presence, at Arafa on the day of pilgrimage there, that he owed another person one hundred dinars, and then if other witnesses affirm that this person was with them on the same day at Cairo, the testimony of the former will prevail'.

[3] "As to the deed of partition [between the defendant and his co-heirs], it is not inconsistent with the fact of sale; for the heirs could have made the partition first and the sale later. Besides, the alleged deed of partition is contradicted by the defendant Ahmad's own evidence of the continuity of ownership; for a partition, by assigning to each person a separate share of the land, would have destroyed the continuity of ownership; for a partition is a form of alienation, according to Khalil and other authorities.

[4] "As to the testimony of the notaries and the inquest that the defendant Ahmad ash-Shahlawi is a man of substance, of good

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character, and never known to have done evil (this testimony being offered to rebut the plaintiffs' testimony that he was a man brutal and unjust to the helpless, and that in this case particularly he had done a grievous wrong to the plaintiffs), it may be remarked that the testimony produced by the defendant does tend to prove his high moral character, while that produced by the plaintiffs tends to prove his bad character. Now on principle, the latter testimony should prevail. Khalil says, 'evidence of bad character prevails.' And in the *Tohfa* [about A. D. 1400] also it is said; 'Testimony impeaching a person, other things being equal, prevails over testimony tending to support his character.' This is so because the former is affirmative, the latter is negative; and, as already pointed out, affirmative testimony prevails over negative. Moreover, the testimony for the plaintiffs goes to a specific fact while that for the defendants goes to an indefinite fact. In the *Miyar* [a collection of opinions by Al-Wancharisi, about A. D. 1500], in his opinion on marriage, is given the following response by Ibn Allak to a question put: 'Testimony to a specific fact prevails over testimony to an indefinite fact; the authorities agree on this point.' In the *Lamiya* [of Az-Zakkak, about A. D. 1500] the very point of this case is anticipated: 'A precise testimony prevails over an inexact one.'

[5] "We conclude therefore that the said American must deliver possession of the two plots to the Burekka heirs and restore the fruits gathered, pursuant to Khalil's rule as to 'the products of a thing used' and to the passage in the *Tohfa* of Hasim [about A. D. 1400], 'The disseisor is bound to restore the value of the products taken and to give back the thing itself.'

"As to costs, the defendant Ash-Shahlawi must reimburse these also, if he has acted fraudulently, as proved by an admission or by incontrovertible proof. Now in the present case he has indeed disputed the plaintiffs' claim, and the law has given credit to his adversary's evidence. He maintained that he was not dishonest and did not appropriate the plaintiffs' property; and the law has found

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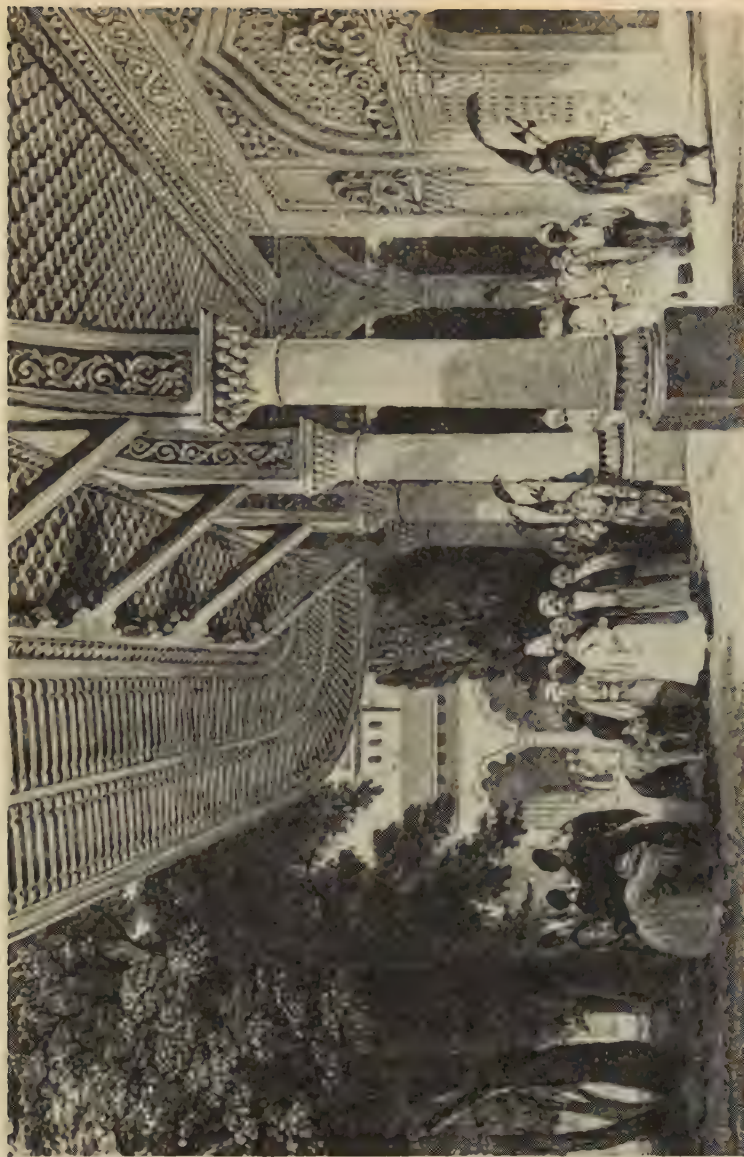
him guilty and liable. But this does not signify necessarily that he was at bottom dishonest in the affair. A saying [of the Prophet] tells us, 'Though one of you may merely be more eloquent than another in his pleading, still I must judge the case by what I hear [without thereby pronouncing upon character or motives].'

"Such is our opinion, after examining the record and reviewing the issues. God—may his name be praised!—knows best what is true, and to him must we resort. 26th of Shaban, year 1332 [July 20, 1914]."

### (III) CRIMINAL JUSTICE (THE DIVAN)

10. But the system of law just described did not cover the whole of the administration of justice; it represented mainly the private law, or civil justice, as we should call it. There remained the divan, or personal justice of the sovereign, the Khalif, roughly corresponding to our criminal justice.

The Khalif held audience in his divan, or office; and in the court-yard leading to the divan of the palace<sup>28</sup> assembled and waited all who sought the justice of the Khalif. Any subject could apply in person to the ruler for justice upon a wrongdoer. The power to administer what our philosophers used to call retributive justice (or repressive justice) has always in Islam been appurtenant to the executive power; "the administration of justice," said an Islamic jurist, "is the most noble attribute of sovereignty." This prerogative of personal justice of the ruler is



IX. 28—COURT-YARD OF THE SERAI (OR, PALACE) AT STAMBOUL



## *IX. Mohammedan Legal System*

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characteristic of all Islamic countries, modern as well as medieval.

This justice was more or less discretionary; hence come the many travelers' tales of the arbitrariness of Oriental justice,—illustrated also in the world-famous anecdotes, in the Arabian Nights, of the brilliant Khalif Harun-ar-Rashid. Harun's reign, the end of the 700's, has been called the era of Pericles for the Arabs. He was called Ar-Rashid, meaning, The Just. This personal justice of the ruler, in his divan, was in the long run sound, and was popular with the multitude; for it was the only real guarantee, in an autocracy, against the oppression of the poor and humble by the rich and powerful nobles or bureaucrats.<sup>29</sup> An Arab proverb declares: "The oppression of the Sultan for one hundred years is preferable to the oppression of his subjects by each other for one year." "Many times," says an English observer of the 1600's,<sup>p</sup> "when the oppressed subjects can have no justice, they will in troops attend the coming forth of the Emperor and by burning straw on their heads or holding up torches provoke his regard; who brought unto him by his mutes, he doth receive his petition; which oftentimes turns to the ruin of some of those great ones". And another English traveler of the same period confirms explicitly this aspect of the right of personal access and petition:<sup>q</sup>





IX. 29—THE SULTAN, OR KHALIF, ON HIS DIVAN

## *IX. Mohammedan Legal System*

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"Now they of the Serraglio, which goe by his stirrop, have charge to receive such Petitions as are preferred to his Majestie, as he rides along: and many poore folkes, who dare not to approach nigh him, stand afarre off with fire upon their heads, holding up their Petitions in their hands; the which the King seeing, sends immediately to take the said Petitions, and being returned home into his Serraglio, reades them all, and then gives order for redresse as he thinks fit. By reason of which complaints, the King oftentimes takes occasion to execute Justice, even against the most eminent in place, before they are aware, without taking any course in Law against them; but causing a sudden execution of what punishment he pleaseth upon them. Which makes the Bashawes that they care not how seldome the Grand Signior stirres abroad in publike, for feare least in that manner their unjust proceedings and bad Justice should come to his eare."

This prerogative of doing justice in the divan is also delegated to every deputy of the Khalif or Sultan; and out in the provinces the Wali, or Pasha, or Governor, holds a court periodically. In the large cities, the Wali (or Governor) was accustomed (as we have all read in the *Arabian Nights' Tales*) to make the rounds of the principal streets, especially by night, accompanied by his police; he had the power to do justice promptly on the spot,—perhaps on a thief, perhaps on a murderer, caught in the act.

The spectacle at the divan in Stamboul, and the procedure of the Grand Vizir in the 1600's, when adminis-

## 10. *Justice in the Divan*

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tering justice there on behalf of the Sultan—and under his very eyes, indeed—has thus been described by an eye-witness:†

“This Divan is called publike, because any kinde of person whatsoever, publicly and indifferently, may have free accesse unto it to require Justice, to procure grants, and to end their Causes and Controversies, of what nature, condition, or import so ever they bee . . . . The Divan dayes are four in the weeke; viz., Saturday, Sunday, Munday, and Tuesday, upon which dayes the Chiefe Vizir, with all the rest of the Vizirs . . . . all which aforesaid Officers, from the highest to the lowest, are to be at the Divan by breake of day.

“The Vizirs being come into Divan, doe sit within at the further end thereof, with their faces towards the doore, upon a bench which joyneth to the wall, every one in his place as hee is in degree . . . . And in the midst of the roome doe stand all such as require audience of the Bench.

“Now being all come together, and every man set in his owne place, forthwith the Petitioners begin their suites, one by one (who have no need of Attorneys, for every one is to speake for himselfe) referring themselves to the judgement and sentence of the Chiefe Vizir, who (if hee please) may end all; for the other Bashawes doe not speake, but attend till such time as hee shall referre any thing to their arbitrimt, as oftentimes hee doth, for hee having once understood the substance onely of the Cause (to free himselfe from too much trouble) remits the deciding of the greatest part to others . . . . so that after this manner he doth exceedingly ease himselfe of so great a burthen, which otherwise hee alone should bee enforced to undergoe; reserving onely to himselfe that which hee thinketh to bee of greatest import and consequence. And on this wise they spend the time untill it bee Noone; at which houre (one of the Sewers being appointed to bee there present) the Chiefe Vizir

## *IX. Mohammedan Legal System*

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commands that the Dinner bee brought in, and immediately all the common people depart. . . . .

"Dinner being ended, the Chiefe Vizir attendeth onely publique Affaires, and taking Counsell together (if hee pleaseth and thinketh it fit) with the other Bashawes; at last, he determineth and resolveth of all within himselfe, and prepareth to goe in unto the Grand Signior. . . . . and so they goe in unto the Grand Signior, to give account and make him acquainted with what hath passed concerning their Charge. . . . .

"The Grand Signior's Predecessors were alwaies wont, and the present one sometimes, commeth privately by an upper way to a certaine little window which looketh into the Divan, right over the head of the Chiefe Vizir, and there sitteth with a Lattice before him, that he may not be seene, to heare and see what is done in the Divan . . . . . and by this his comming to that window, the Chiefe Vizir (who alwaies standeth in jeopardy of losing his head, upon any displeasure of the Grand Signior) is enforced to carrie himselfe very uprightly and circumspectly in the managing of his affaires."

11. A result of this personal justice of the ruler is to give an almost multifarious variety to Muslim criminal justice; for it takes on the local color of the varied races and regions.

In the Islamic dominions of France, England, and Netherlands, to be sure, criminal justice has in many regions been taken under the direct administration of those governments, and has naturally been given those European features which the dominant power deems desirable. Criminal codes have in some cases been framed on European models; for example, the Criminal Code for India was

## 11. *Justice in European Colonies*

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drafted by Sir James Stephen when a member of the Legislative Council. The courts are in some dependencies staffed partly or wholly by Europeans versed in Mohammedan law and custom. Thus the Mohammedan element of law has been more or less diluted. An example of a trial in one jurisdiction of this sort may be taken from the account of an American eye-witness in the Dutch colony of Borneo:<sup>s</sup>

"The judge is officially styled President of the Native Court. His attitude of profound sincerity, his appreciation of the responsibility of his office, his dignity of demeanor, his refined personality, coupled with his scholarship and superior education, make him compare more than favorably with judges as we know them in the United States. His love of justice and innate reverence for law, so beautifully characteristic of the people of Holland, together with the dignified formality of procedure, brought to this simple courtroom the atmosphere of a temple of justice. . . .

"Since the defendant on trial was a Malay, the jury had to be made up entirely of Malays. . . . In addition to the judge, or president of the court, the jury, the prosecutor and court attaches, there was, conspicuously seated, a distinguished, patriarchal gentleman—venerable, dignified, and kindly of face—his expression strikingly spiritual in character. I found, on inquiry, that he was a Moslem dignitary, a leader of his people and learned in Mohammedan lore, particularly the Koran. The paternal government of Holland requires, in all cases where a Malay or native Mohammedan is on trial for the commission of a crime, that he must have as his friend at court an adviser of the Mohammedan faith, who is there in a sort of 'in loco parentis' relation. . . . The presence of this friend at court, a member and leader of his own religious faith,



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is the inalienable right of every Mohammedan prisoner on trial here in Borneo. . . . .

"The indictment in this instance consisted of ten pages of stilted legal phraseology, and was read aloud by the clerk of the court. The judge then asked the prisoner if he were 'guilty' or 'not guilty'. He pleaded 'not guilty' to each count of the indictment. He had been arrested for burglary, breaking into a tent, and breaking open a small chest in which the victim kept his best sarong and some other personal effects. In other words, the defendant was charged with stealing the sarong of his fellow workman. At the time of his arrest he made full and free confession to all the charges; but, as characteristic of criminals the world over, after having made a confession he denied it after thinking over his situation, and manufactured a defense while in jail awaiting trial,—a typical jail defense.

"The judge was extremely patient and gave the prisoner full latitude in his statements denying the substance of the confession. At the end of his denial he found himself quagmired—he had talked too much, explained too glibly, and his own statements did not tally with one another. . . . .

"As the next step in the proceedings the witnesses were admitted. Up to this time they had been excluded from the court, thus giving the defendant free rein to tell his story to the judge and jury. The chief complaining witness, the victim of the theft, was first sworn, after the manner and in the formula of the Holland courts. But in addition to this, since he and the defendant were of the same Mohammedan faith and he was about to give evidence against a fellow Moslem, he was compelled to take the Mohammedan oath, which was administered by the friendly adviser, a representative of the church, instead of by the court. In its intonation, as well as its penalties for perjury, it was even more solemnly impressive than the Dutch oath. With face to the west wall of the courtroom (Mecca being west of Borneo) and the Koran

## 11. *Justice in European Colonies*

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held over his head about two inches above it, the witness was made to repeat, word for word, the lengthy oath administered by the church patriarch. . . . The prisoner, asked what he had to say, now replied that the testimony of the witnesses was all a lie.

"The prisoner, the witnesses, clerk, other court attaches and spectators, were then all excluded from the courtroom while the judge and jury, in the presence of the Mohammedan adviser, alone considered the evidence. The verdict was unanimous as to guilt. Court was then reconvened. Now comes the function of the official friend of the prisoner, the church adviser, who, up to this time, had sat silently through all the court proceedings, except when administering the oath to Mohammedan witnesses. He was respectfully asked by the judge what punishment should be meted out to the defendant just found guilty of the crime as charged in the indictment.

"With solemn dignity he arose, facing west toward Mecca, read aloud from the Koran, and then turned to the judge, saying: 'There is but one punishment for this offense, the guilt of which has been proven, the penalty as stated in the Koran, which is that the hand that did the stealing (in this case the right hand) should be cut off at the wrist.' As a true exponent of the faith he, therefore, recommended to the court that this penalty be inflicted on the prisoner. And this from the official friend (?) of the defendant! Having relieved himself of this pronouncement, the church dignitary took no further interest in the proceedings, other than to collect his fee at the conclusion of the hearing. . . .

"At the conclusion of the patriarch's statement as to the penalty laid down in the Koran, the judge got in some fine work as a representative of the government. Addressing the prisoner, he stated that, while the penalty he had just heard from the lips of his friendly adviser, is the one prescribed by the laws of the church, the good Queen Wilhelmina did not desire that any of her subjects, even the humblest of her colonial children, should be maimed or mutilated,

## *IX. Mohammedan Legal System*

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but wished them all to live in happiness and comfort; so that instead of ordering his right hand cut off at the wrist, he would sentence the defendant to one and one-half years in prison. When the sentence was passed upon him, the prisoner proceeded, alone, to the outer door of the courtroom, about forty feet away from the bench, where he was met by two awaiting bailiffs, outside. These manacled each of the prisoner's wrists with heavy steel bracelets, the two connected by a heavy chain, something like a log chain but with longer links."<sup>30</sup>

But there are vast regions still more or less independent, in which the criminal justice of Islam persists, with local traits and traditions. Let us rapidly make a few turns of this kaleidoscope.



IX. 30—DYAK CONVICTS IN BORNEO  
Here Mohammedan law is applied under Dutch Judges

## 11. *Justice in Arabia*



IX. 31—THE PALACE-FORTRESS AT RIYAD, IN NEJD

There stands today a palace-fortress, in the city Riyadh,<sup>31</sup> in the remote heart of the Central Arabian plateau, capital of the kingdom of Nejd, which till the World War had been visited by only few European travelers. The Sultan of Nejd, Ibn Saud, starting as ruler over the tribe of Wahabis, the most old-fashioned and puritanic Arabs, became the ruler of all Arabia;<sup>32</sup> for by 1926, in one of the repercussions of the World War, he had captured Mecca and redeemed it from King Hussein of the Hejaz, who was too advanced in modern ways. The Sultan of Nejd still does justice in his divan; and a modern traveler thus pictures the justice of Sultan Ibn Saud:<sup>†</sup>





IX. 32—IBN SAUD, SULTAN OF NEJD  
Chief of the puritanic tribe of Wahabis, he became master  
of Mecca and ruler of Arabia



## 11. *Justice in Arabia*

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"At all times people of the Nejd are happy in the enjoyment of the dominant virtue of his reign,—justice. The truth is that in Nejd as nowhere else in Arabia is the saying, 'Justice is the foundation of the State,' honored in theory and in practice. The justice of Ibn Saud! We hear the word on sea and on land as we travel to Nejd and through it.

"One of the first manifestations of justice is security. I have traveled five months in the heart of Arabia. Although my bags, with locks broken, were with the baggage-train, which was often ahead of us, and although among my men were several of the Bedu, nothing, not even a sheet of paper, did I lose. . . . There is more security in the desert of Arabia today than there is in the big cities of Europe and America.

"How was the miracle achieved? By a return to the 'shar' (or religious law). What is the justice of Ibn Saud but the 'shar'—the Koranic law—the justice of the Prophet? The difference between the 'shar' in Nejd and in other Arab countries, however, is that in the former it is summarily enforced, without favor or discrimination. To the judge, as to the executioner, all guilty heads and all guilty hands are one.

"The Sultan is not without support in his maintenance of order. His governors imitate him, vie with him. One of these in particular has made himself famous in Al-Hasa—famous for his Roman justice.<sup>33</sup> Indeed, when Ibn Jiluwi, cousin of the Sultan and amir, or governor, of Al-Hasa, occupies the seat of judgment, he permits neither pity nor mercy to sit with him. He sits alone, and he has made the Square of Hofuf a place of terror.

"Some men of the tribe of Benu Murrah, who came one day to the palace in Riyadh for food and clothes, departed, after receiving them, in the direction of Al-Hasa and, finding a drove of camels on the way, made off with them. The herdsman complained to the Sultan in Riyadh, who despatched a majjab to Ibn Jiluwi. The amir, when the majjab arrived, sent out four hundred of his men, a

## *IX. Mohammedan Legal System*

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IX. 33—A JUDGE IN NEJD

The white-bearded figure at the left, above, is a dispenser  
of strict justice in Nejd

hundred in each direction—north, east, south, west—to search for and capture the thieves. In less than twenty-four hours they captured also the stolen camels. When the Benu Murrah were brought before the Roman-Arab, there was a question, there was a reply, and there was the word: 'To the Square!' And, on the morning of that terrible day, the sword of the executioner flashed eight times in the Square of Hofuf, and eight heads of the Benu Murrah danced on the ground."

The Bedouin Arab tribes that occupy Africa between Cairo and Tripoli have a peculiar body of customary law of their own, without a written code, but as Mohammedans they observe Mohammedan legal principles in a general way. In this African area, the Senussi brother-

## 11. *Justice in Africa*

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IX. 34—THE JUDGE AT JALO,  
IN THE DESERT

hood, a special Moham-  
medan sect, now exercises  
dominant influence; in the  
World War, its friend-  
ship was sought by both  
sides; but it was so strong  
in its self-protecting  
instincts that until after  
the World War only one  
European explorer had  
ever penetrated to the  
capital city, and he had  
barely escaped with his  
life. In the Senussi sect,  
the "ikhwan" is not only

the teacher of the people, in religion and in general  
knowledge, but is judge and peacemaker between man  
and man and between tribe and tribe.<sup>34</sup> This Judge at  
Jalo studied as a boy under Sayed Ibn Ali el Senussi,  
founder of the sect; he does not rely upon records, for he  
can quote from memory all the events of his period, giv-  
ing the year and the day of every incident. Jalo, where  
he dispenses justice, is the headquarters-town of the  
Majabra tribe, the merchant princes of the Libyan  
Desert.

## IX. Mohammedan Legal System

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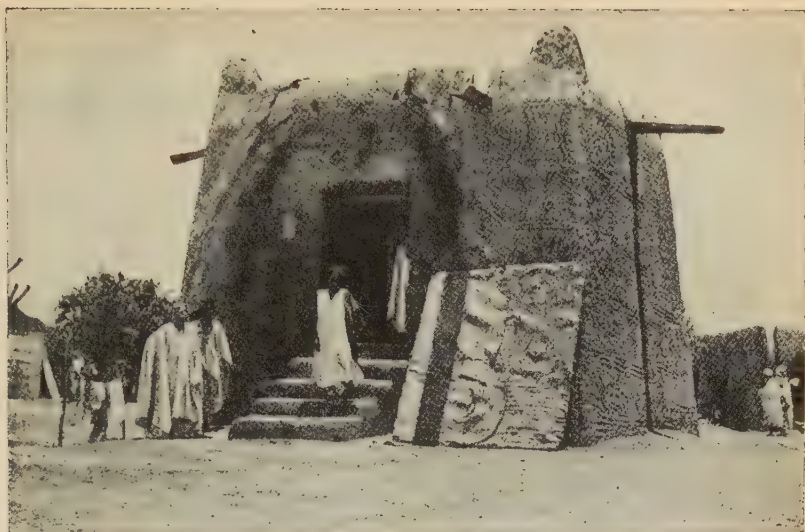


IX. 35—KADI'S HOUSE AT DJENNI, NEAR TIMBUCTOO

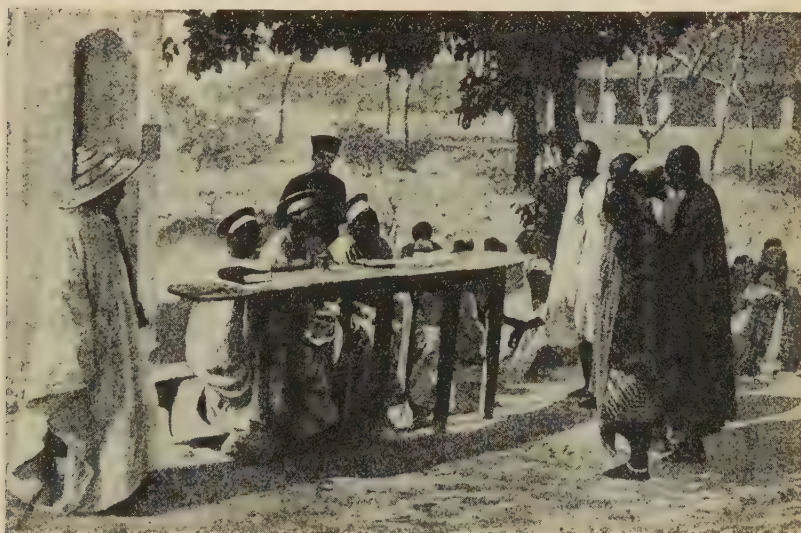
Farther south west in Africa, in the Sudan, at Djenni,<sup>35</sup> a city near Timbuctoo, one finds justice done in the simpler architecture of the desert; the country is old and has

been Islamic for eight centuries. Still farther south, on the Equator, in Nigeria, where no Caucasian had penetrated until recent years, we come to the city of Kano, with walls forty feet thick, fifty high, and eleven miles around; it is the focus of Islam in West Africa; and here,<sup>36</sup> within these walls, we find a market-place, and on market days the magistrate holds summary court—like the old English pie-powder court—on the complaints of the merchants or citizens who have been defrauded. And, near by, in West Africa (French Nigeria) one may encounter a court of justice out in the open,<sup>37</sup> where a digni-





IX. 36—MARKET COURT IN KANO, NIGERIA



IX. 37—NATIVE COURT IN FRENCH WEST AFRICA



## *IX. Mohammedan Legal System*

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fied and uniformed negro judge dispenses justice informally to suppliants.

Crossing Africa, farther to the south and east, in Ruanda, near Lake Tanganyika, in Congoland, we find Sultan Msinga,<sup>38</sup> a ruler seven feet in stature, holding his audiences in the open, with armed attendants, in primitive garb; here the Islamic religion is as yet hardly more than a veneer.

There is indeed in East Africa one pocket of non-Islamic law,—the sturdy Christian nation of Ethiopia



IX. 38—SULTAN OF RUANDA HOLDING COURT

(formerly called Abyssinia, in its native tongue, Kous; the Biblical "Land of Cush"; its race-stock is partly Semitic; its Christianity dates back to the era of Constantine, A.D. 300). Its tribal customary law is unwritten, being voiced at the annual tribal assemblies (like those of the Kelts and the Northmen). But it prides itself upon its basic written Code, the Fetha Nagast,<sup>38a</sup> a semi-ecclesiastical book, put into its present form about A. D. 1200, but founded upon the Byzantine-Christian-neo-Roman legal literature of five centuries earlier.<sup>38b</sup>



IX. 38a.—THE FETHA NAGAST  
(LAWS OF THE KING)

The basic code of Ethiopian law. In the original, the border-ornament is in dark brown; the title is in red



#### IX. 38b.—THE EMPEROR'S JUSTICE IN ETHIOPIA.

The Emperor is shown seated (upper center) among his Councillors; at his right below, in another special chair, is the Chief Justice; in front of whom, one of the three priests reads from the law-book *Fetha Nagast*. Below the priests stand the accused persons; the clerk is making an entry in his book; one of the accused is speaking; at his right is his advocate (holding a cross). Beneath are shown the penalties of flogging, imprisonment, hanging, and shooting

## 11. *Justice in Africa*

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The daily scene of Justice in Ethiopia has been thus described by an observer:<sup>44</sup>

"Ethiopia has its Supreme Court, which today still passes judgments according [traditionally] to the laws of Solomon. This Court has jurisdiction in all important cases, such as those which involve murder or inheritance disputes. After it come the district law courts, which try more petty cases; their judges are chosen for the most part from among city and town officials, in whom the Government vests power to administer justice. Such officials may, in turn, delegate judicial powers to two worthy inhabitants as assistants. These [last] courts use no regular court building, but meet for trials on any convenient street corner or village plaza.<sup>38c</sup> There, like shopkeepers or street peddlers, they may sit down and wait for cases to come. Because of the incessant haggling common in all Ethiopian trade transactions, these street courts seldom have to wait long before litigants appear.

"Any citizen who feels he has been wronged may demand that his aggressor go with him to the nearest judge. Such a challenge is usually accepted at once, as the people seem to enjoy litigation. Should an alleged wrongdoer refuse, a plaintiff may go to the judge, who will then assign two stalwart citizens to fetch the other party, by physical force if need be, in the interest of "ethics." Accuser and accused each has the right to give a detailed account of his case; to bring all witnesses to the spot who may help verify his statements; and also to question such witnesses. He who for any reason will not conduct his case alone may take a lawyer; many self-made lawyers, listening eagerly and freely commenting on the case, are always found in street crowds, attracted by these open-air courts. The noisy, free-for-all courts permit endless oratory, on themes relevant and irrelevant, in which both plaintiff and defendants may also distinguish themselves. Speeches may dissect any topic, from private scandal to the Nation's gravest foreign affairs. Hence a visit to such courts is, for the Ethiopian, not only amusing but also a source of political instruction. At most of such courts the crowd seeking justice is so large that trials are held daily, without interruption, from 9 o'clock in the morning until 5 in the afternoon.



## IX. Mohammedan Legal System

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"Another reason for the popularity of these law courts is that here the native passion for gambling is officially linked with the search for truth and justice. Either or both plaintiff and defendant, when he has made a statement, may lay a bet that he is right, and that the court will so find. Half a sheep, a pound of flour—even a white horse—may be wagered, depending on the importance of the dispute. If one litigant offers such a bet, the other can only 'take the bet,' or else retract his own statement and thus lose the suit. Often, in the end, these bets are worth more than the trifling object which started the quarrel."



IX. 38c.—A STREET COURT IN ETHIOPIA

The man with the cane and pith hat at right has been selected as judge to hear the case



## 11. *Justice in Africa and Asia*

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Crossing the Red Sea to the Yemen, in remotest Southern Arabia, one may observe the simple and unceremonious manner in which criminal justice is dispensed by the judge.<sup>39</sup>

Vaulting over land and sea some thousands of miles to the extreme East, near the coast of the China Sea, we find a peculiar people, the Chams, practising Islam for six centuries or more, up in the hills of Annam,<sup>40</sup> where the magistrate does solemn justice in the steaming jungle.

Down in the East Indies, at Kedah and Johore,<sup>41</sup> we find Islamic Sultans ably ruling islands each as large as some of our states, and holding their own in the manners and accomplishments of modern Europeans; this Sultan



IX. 39—A KADI OF SOUTHERN ARABIA



IX. 40—A JUNGLE COURT IN ANNAM



IX. 41—SULTANS OF KEDAH AND JOHORE

## 11. *Justice in Asia*

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of Johore put on the British khaki during the World War.

It is in modern Persia and Afghanistan that this personal justice of the ruler seemed to survive to recent times most unimpaired in all its medieval Oriental directness, despotism, and flexibility. A few years past the chief of police, or wali, at Tehran, in Persia, might have been seen making his daily rounds of the streets with his executioners or bailiffs, doing summary justice on offenders caught in the act. And the Shah, when concerned about setting a warning example to pestiferous highway robbers or murderers, might have executed their leader by blowing him from the cannon's mouth.<sup>42</sup> In Afghanistan the ab-



IX. 42—CANNON-EXECUTION IN PERSIA

## IX. Mohammedan Legal System

solute Amir, until recent times, did justice personally and with dramatic methods. A thief who pleaded hunger as an excuse was released and given employment; but when he stole again and was caught, he was hung aloft in an iron cage on a pole, forty feet above the



IX. 43—STARVATION-CAGE FOR A FOOD-THIEF, AFGHANISTAN



IX. 44—OTTOMAN MINISTER OF JUSTICE, 1911

river, to starve to death.<sup>43</sup> A butcher who sold bad meat was nailed by his ears to his stall, as a warning.<sup>44</sup>

12. In modern Turkey, however, we come back again to the modern citizen of the world; an example may be seen in Doctor, or Mollah, Nejmedin, Minister of Justice in 1911,<sup>44</sup>—a cosmopolitan jurist



## 12. *Occidentalization*

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representing the best results capable of accomplishment in the Islamic legal system. Turkey, indeed, with its cosmopolitan capital Constantinople, had been gradually occidentalizing its legal system for three generations past, by introducing Romanesque principles from the European codes, mainly in commercial law. But the new Turkish Republic has taken even more radical steps towards occidentalization. In April, 1924, the Assembly adopted a new constitution, abolished the old courts of Islamic law, declared the separation of law from religion, and replaced the old laws with a new group of codes founded explicitly on Romanesque European models.

Persia, too, is experiencing a similar occidentalization. American advisers have reorganized its financial system, and its civil law has been revised and codified under French auspices. Its new Parliament and its Ministry of Justice are presided over by cosmopolitan jurists; one of the most prominent contemporary statesmen, eminent as a jurist, Zoka el Molk, was Chief Justice of the Supreme Court and later (1926) Minister of Finance.<sup>45</sup>

Afghanistan has likewise entered upon the path of occidentalization. In the Amir Amanullah this sturdy nation of mountaineers found a leader who with the brilliant personality of a modern Harun-ar-Rashid undertook to re-fit his people for the changing times; but his radical measures were premature.



## *IX. Mohammedan Legal System*

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IX. 45—PERSIAN CHIEF JUSTICE

How soon and how deeply the ancient system of Islam in these countries will be supplanted in spirit and in practice, time alone can reveal. The same process of purposive occidentalization, with a view to conformity, began in Japan fifty years ago, and in Siam thirty years ago; and followed seasonably in China. In all these nations the general phenomenon is of the same type: On

the one hand is the pressure for occidentalization, induced by the attractions of standardized Western commerce and invention, and by the contacts of Western international politics. On the other hand is the pressure of the spirit of nationality, and the conservatism of traditional morality and religion and ingrained popular ideas of justice. Whether the resultant of these forces will ever be a genuine transformation of institutions must be left to the historian of the future.

### (IV) RETROSPECT

The Islamic system, of the three world-systems, is now the oldest extant in history; it dates back twelve hundred

## *Retrospect*

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years continuously. Looking back and out over the entirety of that system, we see it originating and developed by the native juristic instinct of the Arab race, but firmly accepted for centuries by many different races from Annam to Andalusia. One must acknowledge in it three remarkable features, two only of which it shares with the Romanesque and the Anglican systems. First, it has furnished a common language of education, government, and progress to peoples dis-united by scores of local languages; for the Arabic script prevails from West China to West Africa. Secondly, it has proved itself, as an instrument of social order, adaptable to do justice for hundreds of communities of variant local customs and institutions. And thirdly (in which it contrasts with the Anglican Christian system) it has leveled all distinctions of caste or color; Mongolian, Aryan, Semite, and Negro, white, black, or yellow, are all socially as well as legally equal in the brotherhood of Islam. In the Islamic world, a man's nationality depends on his religion, not on his ancestry. There are no barriers inside Islam, whether between priest and people, race and race, or class and class.<sup>v</sup>

In the faith of this simple religion, some two hundred and fifty million souls still look to the sayings of Mohammed as the inspiration of their social duties and their legal rights; one human being in every eight of the world's

## IX. Mohammedan Legal System

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IX. 46—MAP OF ISLAMIC REGIONS

This map aims to show only the broad outlines of the Islamic area, without noting the different types and degrees of the vogue of Islam, which are shown more exactly in the Appendix Map and Key

population is a Muslim.<sup>46</sup> And still, from Borneo to Morocco, from the cold prairies of Central Asia to the jungles of Equatorial Africa, the Muezzin on the summit of every one of thousands of mosques five times each day





IX. 47—THE MUEZZIN'S CALL



## *Retrospect*

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calls the faithful to prayer:<sup>47</sup> “Allah akbar. La ilaha illa allah. Mohammed er-raïsul allah. Jih hala es-salat. Jih hala es-salim”. “God is great. There is no God but God. Mohammed is his apostle. Come to prayer! Come to salvation!”

## IX. Mohammedan Legal System

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- i. Scheme of Legal Training. Adapted from the account in *Savvas Pacha*, "Etude sur la théorie du droit musulman", *passim* (cited *infra*).



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- j.* Shaikh ul Islam. From Master *George Sandys*, "Relation of a Journey, A. D. 1610", §III (in "Purchas his Pilgrims", vol. VIII, p. 137, ed. Mac-Lehose, Glasgow, 1905).
- k.* Printing-press. From *Ahmed Emin*, "Development of Turkey as measured by its Press" (1914), p. 23, as quoted in *John R. Mott*, "The Moslem World of Today" (1925), p. 125.
- kk.* "Les Prolégomènes d'Ibn Khaldoun", transl. *DeSlane* (Paris, Geuthner, photoprint of 1934), part I, page 449. *Ibn Khaldoun* (1332-1406), the most eminent Arabian historian and the last of their great philosophers, came of a family of jurists and was himself chief Malekite *cadi* at Cairo for six different periods.
- kkk.* "Prolégomènes", I, 450.
- l.* Kadi in Morocco. From *Milliot*, cited *infra*. The following passage is from a diplomat who spent long years in the East: Sir *Edmund Hornby*, "Autobiography" (1929), p. 102: "To my mind, and after a long experience of Eastern peoples, it is impossible to attach a too high estimate to the office of 'Judge'. It is curious to observe the profound respect in which Easterns regard the 'Law'. Half the reverence shown to the memory of Mahomet is founded on the fact that he received the law and expounded it. The chief claim the Sultans possess to the obedience of the Faithful arises from their being regarded as the fountains of justice,—law and justice being synonymous terms in the mind of a Mohammedan." In *Eldon Rutter*, "The Holy Cities of Arabia" (New York, 1928, vol. II, chap. VI, p. 103), is a description of a day in the Kadi's court at Mecca.
- m.* Divorce-Tribunal in Tunis. Quoted from *Norma Lorimer*, "By the Waters of Carthage", p. 346 (New York, Pott, 1906).
- mm.* From "Prolégomènes", I, 456 (cited *supra*).
- n.* Mufti in Tetuan. Quoted from *Stephen Bonsal*, "Morocco As It Is", p. 283 (New York, 1893).
- o.* Documents of a Lawsuit. From *Louis Milliot*, "Recueil de Jurisprudence Chérifienne: Tribunal du Ministre Chérifien de la Justice et Conseil Supérieur d'Oulema", vol. I, pp. 52-115, *passim* (Paris, Leroux, vols. I, II, 1920, vol. III, 1924; Publications de l'Institut des hautes études marocaines).
- p.* Right of Petition. From *Sandys*, §III (Purchas, cited *supra*, p. 139). The obstructiveness of the Oriental autocrat's ministers and clerks is found in even modern times: *Stanley Warburton*, "An Aviator in Vishnu Land" (1928, pp. 80, 83): "Our host informed us that the best time to see the kaid was the early evening, and that he knew a man who knew an Arab, etc.—eventually leading to a pay-

## Sources

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ment for a definite engagement at the kaid's house at 5:30 that evening. . . . . As a matter of fact, we never did see the kaid. . . . . There was always some excuse—the kaid was out, or he was sick, or he was busy. . . . . It may seem funny that we did not go straight to the kaid at first without the negro's help; but long residence in the East had taught us that a good report should always precede such a visit, bought by discreet presents to all the intermediaries that stand between a chief of any kind and casual visitors. The whole Eastern system of administration is built up on this assumption. . . . It can be done otherwise; but I am not certain that any time is saved, and the cost, in the early stages of an interview, is (comparatively) very small; it is the chief himself who 'soaks' you."

- q. Right of Petition. From Master *Robert Withers*, "The Grand Signior's Serraglio", §X (in "Purchas his Pilgrims", IX, 385, cited *supra*).
- r. Divan at Stamboul. From *Withers*, §II (in Purchas, IX, 329, cited *supra*). Another eye-witness' description—of the Mogul Emperor's court at Delhi—is that of *Bernier*, in Pinkerton, vol. VIII, p. 158 (cited *ante*, chap. V).
- s. Justice in Borneo. From *William O. Krohn*, "In Borneo Jungles, amid the Dyak Headhunters", p. 100 (Indianapolis, Bobbs-Merrill Co., 1927). This Koranic penalty of cutting off the hand for thieving is still actively enforced in Southern Arabia (*Bertram Thomas*, "Arabia Felix" (1932), p. 119).
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Other accounts of Arab justice: *Douglas V. Duff*, "The King's Justice", *Asia Magazine*, February 1935, p. 125; *T. E. Lawrence*, "Sev-

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- en Pillars of Wisdom" (1935 ed., p. 68; a brief account of Beduin justice); *Ameen Rihani*, "Around the Coasts of Arabia" (London, 1930; an interesting chapter on the mode of trial).
- tt. From *Harold P. Lechenberg*, "Open-Air Courts of Ethiopia" (National Geographic Magazine, 1935, Nov., LXVIII, 633, at 643).
- u. This personal justice tended to become summary, to a degree that is as shocking to our sentiments as our tediousness is to theirs; witness the following eminent observer: *Earl of Cromer*, "Modern Egypt" (New York, MacMillan, 1908, vol. II, 522): [When the French criminal code was put into force in parts of Algeria,] "one of the principal Algerian Sheikhs commented, 'Then there will be no justice! Witnesses will be required'! The Sheikh was not in the least struck with the fact that in the absence of witnesses an innocent man might possibly be condemned. What struck him was, that as no one could be condemned without witnesses, guilty people would generally escape punishment. This is precisely what is happening in Egypt [since the Western Criminal courts were introduced]."
- v. In *R. B. Cunningham-Graham*, "Mogreb-el-Acksa" (London, Duckworth, 3d ed., 1898, p. 117) is given emphatic testimony to Islam's levelling all distinctions of birth and social condition, in contrast to Christianity.

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- V. *Note on Roman Law and Mohammedan Law.* The view has occasionally been advanced that the Mohammedan legal system not only borrowed some or many of its rules, but also took some or many of its general ideas, from the books and teachers of Roman-Greek law in the conquered regions of Syria and Mesopotamia in the 700's; so that originality is denied to the Mohammedan system, and its rapid development is explained as due to a building on the achievements of Roman law.

This theory is believed by the present author to be completely unsound,—for several reasons, not suitable for exposition here. All the characteristic features of early Islamic law are alien to the imperial Roman system, and are in close affinity with the other Semitic racial law, the Jewish.

The chief promulgator of the Romanistic theory is the great German Islamist, *Ignaz Goldziher*; his view is summarized, with citations to several other authors, in "Muhammedanische Studien", part II, par. VIII, pp. 73–77 (Halle, Niemeyer, 1890); "Le Dogme et la Loi de l'Islam: histoire du développement dogmatique et juridique de la religion musulmane" (pp. 3, 39; transl. from the German by P. Arin; Paris, Geuthner, 1920), and "The Principles of Law in Islam" (in "The Historians' History of the World," 1907, vol. III, Ch. XII, p. 294). It has been given currency in English by *Charles P. Sherman*, "Roman Law in the Modern World", vol. I, §§ 187, 188 (Boston Book Co., 1917).

There is little literature on this issue, and its solution needs thorough treatment by a scholar versed equally in Roman law and in Arabic and in Hebrew literature. The contrary view is supported by *Ernest Rénan*, "Histoire générale des langues sémitiques", 3d ed., p. 380. Mention of the controversy will be found in the works of *Savvas Pacha* and of *Griffini*,

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cited above. *Huart* (cited *supra*) at p. 234, referring to Abu Hanifa, expresses as "probable" a view similar to that of Goldziher. *Evaristo Carusi*, "Sui rapporti fra diritto romano e diritto musulmano" (Atti della Società italiana per il progresso della scienza, 7th meeting, Siena, Sept. 1913, pp. 827-869; Rome, 1914, Society above, Via del Collegio Romano 26) maintains that "the Musulman law is bound up in its origin with the oriental Roman law, which is thus its most important source; and consequently an identity of philosophical mental attitude unites it also with the general Roman law"; but his evidence is weak. In the following work, whose author is apparently a disciple of Carusi, an unconvincing attempt is made to show a connection between Byzantine and Islamic law in the institution of the family right of priority in purchase of land: *Emilio Bussi*, "Ricerche intorno alle relazioni fra il Retratto Bizantino e Musulmano" (Milan, 1933, Pubbl. d. Università del Sacro Cuore; 2d ser. Scienze Giuridiche, vol. XLI).

For the contrary view, however, special weight must be given to the following passage from a letter to the present author, dated August 27, 1934, of Professor *Carlo Nallino*, of Rome, the most eminent living authority on early Arabic legal literature: "I have not yet had time to prepare for press the views orally expressed by me at Leiden and at Rome on the question of the influence of Roman law on Musulman law. (a) My conclusions are completely negative as regards the *knowledge* of the books of Roman law by the Musulman jurists. The juristic Arabic literature is absolutely independent of the other juristic literatures. It owes its origin and its vast development to the fact that the private law and also a part of the public law (especially the penal and procedural law and many aspects of the financial State law) were regarded by the Musulmans immediately succeeding Mohammed as having their root in the divine will, manifested in the Koran, the hadith, and the 'igma; so that the study of the law was regarded as a part of religious learning. And in the period of Abu Hanifa the word 'figh' signified not merely (as in the ensuing period) the law for Musulmans but also the dogmatic scheme of Islamism. (b) As respects the *rules* themselves of private law and in great part of public law also, my conclusions are that the influence of Roman law was a minimum one. The Musulman law—what the Arabs call 'figh'—is the natural development of the pre-Islamic Arabic law, deeply modified in several parts by Mohammed in the second period of his career, i. e. when at Medina he became also the chief of a State. It could indeed be supposed that in the pre-Islamic Arabic law there had

## *IX. Mohammedan Legal System*

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been Roman influences; but here we should be in the field of pure speculations, to which we cannot attribute any value.—You are entirely right in regarding as absurd the notion that there could have been any Byzantine juristic influence on Malik ibn Anas (who boasts that he is preserving the juristic tradition of Medina where that diverges from the tradition of other parts of Arabia) or upon Zaid ibn Ali."



THE  
KELTIC  
LEGAL SYSTEM





## Prologue to Chapters X, XI, XII

The legal systems now to be described all arose and developed, in Europe, since the Christian era. In approaching the first three—Keltic, Slavic, and Germanic,—it must be recalled that at the time of the opening of the Christian era these races represented strong, untutored, illiterate peoples. They were so crude that they had not yet devised writing as a means of education and of record (except for the secret runes known only to the priests and a few chieftains). They lived wholly outside the pale of the great literatures of thought and experience built up and transmitted successively for four thousand years, along the Mediterranean coasts, by Egyptians, Babylonians, Hebrews, Greeks and Romans. They were vigorous and civilized; but they totally lacked records of their own customs and institutions. The map shows these illiterate peoples in white; the other regions shaded.<sup>1</sup>

Now the grand racial phenomenon of Europe, for the next ten centuries after the Christian era, was the gradual contact of these three illiterate races with the Mediterranean civilizations. This vast white area on the map is in its turn to become literate. The three new races gradually acquire writing. This is a stimulus to record their own institutions, and hence to formulate and to develop them. There is thus a testing of their comparative capacity to develop their native legal institutions.



## X

### *The Keltic Legal System*

#### *(I) First Period: Keltic Independence*

1. Conquest of Gaul by Julius Caesar.
2. Two types of Kelts—Political instability—Survival of the legal system in Wales and Ireland.
3. Druids as judges and repositories of the unwritten law—Carnac monuments—Druid justice.
4. Extirpation of the Druids.

#### *(II) Second Period: The Surviving Keltic Systems*

5. Stages of Irish legal history.
6. Primitive conditions.
7. King Cormac the legislator—The Assembly at Tara.
8. Judgments of the Brehons—The “Wrong Judgments” of Caratnia.
9. St. Pathric brings letters—The customs recorded.
10. Irish leadership in literature and learning.
11. The Irish law-books—The *Senchus Mor*—Law of distress, and of damage by pigs—Script of the law-books.
12. The Welsh law-books—Code of Howel the Good—The triads.
13. Contrast between Keltic and English legal ideas—James Lynch’s Case.

#### *(III) Third Period: Dissolution of the Keltic System*

14. Llewellyn the Great—Magna Carta saves Welsh law—Henry VIII extirpates it.
15. Irish law abolished by James I—Causes for its overthrow—The Curse of Tara.
16. Daniel O’Connell and the Repeal—The Irish Free State, and the Irish Chief Court of 1924.



X. 1—MAP OF EUROPE SHOWING LITERATE REGIONS, A. D. 50  
The shaded areas show the literate peoples at that period. The  
process of the next thousand years was the gradual extension  
of written records throughout Europe





X. 2—VERCINGETORIX SURRENDERS TO CAESAR  
This surrender virtually ended Keltic independence in Gaul



## X

# The Keltic Legal System



THE history of the Keltic legal system falls naturally into three periods. The first, to Julius Caesar's conquest of Gaul and Britain, is the period of political independence. The second, to about A. D. 1500, is the period of independence of the surviving branches of the Keltic legal system, the Welsh and the Irish. The third period sees the final dissolution of these two.

CHART OF PERIODS: KELTIC LEGAL SYSTEM

|            |                                                         |
|------------|---------------------------------------------------------|
| B. C. 600  | I.                                                      |
| B. C. 50   | Period of POLITICAL INDEPENDENCE                        |
| —A. D.     | II.                                                     |
|            | Period of the SURVIVING BRANCHES<br>of the Legal System |
| A. D. 1400 | WELSH AND IRISH                                         |
| A. D. 1500 | III.                                                    |
| A. D. 1600 | Period of their DISSOLUTION                             |

### (I) FIRST PERIOD

#### POLITICAL INDEPENDENCE

1. One of the most momentous days in all European history was the autumn morning in the 52d year B. C. when Vercingetorix and the united Gauls surrendered to Julius Caesar.<sup>2</sup> Caesar's victorious army had besieged Alesia (not far from Chaumont, where the American Expeditionary Force was headquartered two thousand years



X. 3—STATUE OF VERCINGETORIX

## *1. Caesar's Conquest of Gaul*

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later). The gallant young chieftain of the defeated Gauls, the most brilliant leader in the history of his race, comparable only to Charles Parnell and Daniel O'Connell in modern times, realized that he had led his people to hopeless defeat, called together his chiefs, and offered either to surrender with them to Caesar or to kill himself as a sacrifice to free them. They left the choice to Caesar, and he demanded surrender. So Caesar took his seat on the rampart before the camp, and Vercingetorix came forward, threw down his arms, and made formal surrender to Caesar of the rebellious Keltic tribes.<sup>3</sup>

From that day, the political and legal destiny of the Keltic race was forever sealed. That race was to be absorbed by its Roman and Germanic successors; out of this fusion two great peoples, the future French and British nations, were to be born.

2. Vercingetorix was the physical type of the ruling class among the Kelts,—tall, light-complexioned, with long, reddish or yellow hair. But this type has become less common. When the Kelts had invaded the country from the East (some six centuries before this) they had conquered and imposed their language upon a native people, short, dark-complexioned, and black-haired. This latter type predominates among the modern survivors. But we shall never know to which of these two types in the



## *X. Keltic Legal System*

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composite race may be attributed the marked traits that have been noticed by observers in every age,—its emotionality, its imagination, its cheeriness, its wit, its quickness, its eloquence, its versatility, its affectionateness, its deep family loyalty; and on the other hand, its warm temper, its clannishness, its perpetual clan-quarrelsomeness, and above all its incapacity to unite itself under a stable government and to maintain its political independence.

From about B. C. 600 the Keltic tribes had come to settle all Europe west of the Rhine and the Alps, and south to the Apennines.<sup>4</sup> The Germanic tribes were then still dormant in the East and North. But after the Roman conquest, five or more centuries later, and the Germanic conquests another five centuries later, that is, about A. D. 700, almost the entire Keltic race had been subjugated and either extinguished or absorbed. There remained only four small areas where it survived in isolated and primitive purity—Wales, Ireland, upper Scotland, and Brittany. In Ireland it was the Irish Channel that protected them; in Wales and Scotland it was their mountain fastnesses, and to Snowdon Peak every Welsh king has retreated in time of distress. But these same mountains also served to keep the Kelts in their primitive tribal and pastoral stage. Their sole

## 2. Racial Traits



X. 4—MAP OF KELTIC RACE SETTLEMENTS

The darkest shadings show the areas where Keltic peoples remained isolated till later periods

activities were cattle-raising and clan-warfare. They changed little in a thousand years; and they were fated economically to yield to the neighboring peoples who progressed in agriculture and commerce.

3. The Kelts possessed indeed a legal system, and a well-developed one. But in only two of these regions,

## *X. Keltic Legal System*

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Wales and Ireland, did it ever reach the stage of written records, and then too late to save it. For its earliest known stage we have to depend largely on Caesar's account. He tells us of the Druids as professional dispensers of justice:<sup>a</sup> "Among the Gauls, the Druids decide almost all disputes, both public and private. If any crime is committed or violence done or any dispute arises over inheritance or land-boundaries, they are the ones who render judgment, and fix the compensation and the penalty. If any man or group of men fails to obey their decree, they excommunicate him, and this penalty is regarded as the most deterrent. . . . At a certain time of the year, in the Carnutian region, which is deemed the center of all Gaul, they assemble at a consecrated spot; and here, from every quarter, resort all who have disputes, and the decrees and judgments of the Druids are obeyed". Such is Caesar's account.

These stone alignments, the meeting-places of the Kelts, were typical of thousands of similar megalithic remains scattered all over Gaul and Britain. Stonehenge, near Salisbury,<sup>e</sup> is the best known and the best preserved extant in Britain. Although they doubtless have a prehistoric origin, they are associated in tradition with the Keltic Druids; and they must have served as the local meeting-places for the Keltic assemblies and the religious



X. 6—STONEHENGE: A PRIMITIVE POPULAR CEREMONY



## *X. Keltic Legal System*

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ceremonies of the Druids. In their primitive religion, great stones played a mysterious part; there are three thousand of these stone dolmens in France alone. And even in modern times in Brittany a popular festival may be seen at these stone-monuments, paying reverence to the memories of two thousand years ago.

But among all the thousands of these mighty megalithic structures, the mystic center of the Keltic world was this plain of Carnac,<sup>7</sup> which Caesar calls the center of all Gaul, where the annual assembly of all the Druids took place. And the modern lawyer as he stands on this



X. 7—THE PLAIN OF CARNAC



### 3. *Druid Justice*

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historic spot goes back in imagination, not to the Keltic legends of King Arthur and the Knights of the Round Table, and the enchanter Merlin, and the loves of Geraint and Enid, but rather to the Druid jurists.

For the Keltic race, with all its economic primitiveness, had developed a unique professional class, not exactly paralleled in any of the other legal systems. The Druid fraternity, that met at Carnac, combined the functions of priest, magician, teacher, physician, historian, bard, and jurist. These functions came to be divided among different groups within the fraternity; there was a long period of training neophytes; their knowledge was transmitted solely by memory, not by writing; and the graduates emerged as specialists in one or more branches of learning. The modern Welsh *eisteddfod*, or song contest,<sup>8</sup> is a revival of the ancient Keltic institution of the Druid bards; a chief bard, for example, was one qualified to recite at least three hundred and fifty tales of heroic history, with which to entertain the chieftains on the long winter nights.

Now the Druids, with their possession of all knowledge, were the real masters of the early Kelts; the tribal chiefs, or kings, were mainly their leaders in battle. The chiefs, or kings (in Gaul, the elders), did indeed possess the judicial power. In Irish legends the good king is often

## *X. Keltic Legal System*

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spoken of as a just judge. As ruler, and as head of the family, or clan, the chief's leadership and prowess made him the source of what we should call state authority in



X. 8—AN EISTEDDFOD ASSEMBLY IN WALES  
The ancient costumes and emblems are here seen restored to use



X. 9—A DRUID PRONOUNCING A JUDGMENT



### 3. *Druid Justice*

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all things. As in the Homeric Greek days, and in later Germanic days, the chief was "ex officio" the presiding officer at assemblies and courts. But the Druids were his advisers in matters of law and justice; and, as in all primitive systems, their spiritual and hieratic status was virtually one of control, in their field.

The Druid jurists, in Ireland, were known as "brehons", from "breth", a judgment. These Brehons were the repositories of the customary law. When they spoke in the assembly, their judgments were implicitly obeyed.<sup>9</sup> The Druids' power lay, not in physical or political force, but in their influence as priests of religion and magic; for the imaginative Keltic race has always been most susceptible to the supernatural, and especially to religion. The judgments of the Druids were enforced by their own magic powers; they excommunicated the disobedient, and their solemn curse was the deepest dread of the Kelts. Caesar has concisely recorded the effect of this interdict: "This penalty is the severest. When any one is thus excommunicated he is regarded as of the godless and wicked class. All men shun him. They flee when he approaches or speaks, lest, by contagion, they partake of his sorry lot. He can claim no justice for his wrongs, nor can he hold any public office."

But an unjust judgment recoiled, with its own magical retribution, on the judge himself. For some judges,



## *X. Keltic Legal System*

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three large scabs would appear upon the face. For another judge, all the fruit would fall from the trees in one night. The most celebrated peculiarity was that of the Irish judge, Morann, who wore a gold collar; for when his judgment was just, the collar grew larger and fell to his waist, but if it should be unjust, the collar would grow smaller about his neck and choke him.

4. The Druids, as priests, presided at the sacrifices; and in pagan Gaul at least there were human sacrifices.<sup>10</sup> And this practice led to their political downfall. It was this practice which excited the horror of the Roman con-



X. 10—DRUIDS OFFERING A HUMAN SACRIFICE

querors (who had themselves abandoned it scarcely a century before). Julius Caesar himself did not interfere. But his successors, Augustus, Tiberius and Claudius, a few years after the Conquest, in the first century A. D., not only suppressed the religion of the Druids, but exterminated the entire

#### 4. *Extirpation of the Druids*

fraternity itself. Presumably the political influence of the Druids over the Kelts could no longer be brooked by their Roman rulers. Roman praetors replaced the Celtic Druids, and for four centuries thereafter justice was administered in Gaul and Britain, not by Druids seated on stone circles, but by Roman praetors in basilicas.<sup>11</sup>

Thus disappeared, with the Druid class, the Celtic legal system in Gaul and Britain. It had never been committed to writing; the Druids alone knew its rules; and not a vestige there remains. Only in Wales and Ireland do we know it, as a written system, in later times. This brings us to the second period of the system.

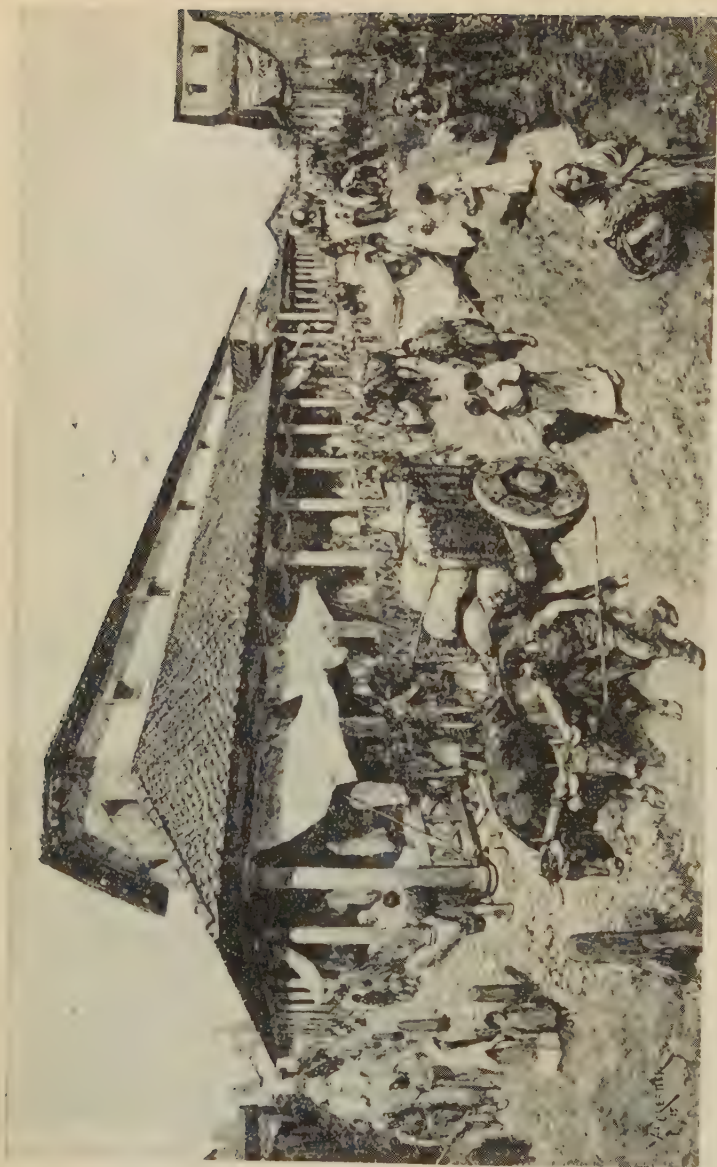
#### (II) SECOND PERIOD

##### THE SURVIVING KELTIC LEGAL SYSTEMS

5. Of these two branches, the Irish was earliest recorded and most fully developed.

The Irish history may be summarized in four stages:

| PERIODS OF THE IRISH LEGAL SYSTEM |                                               |                                                    |
|-----------------------------------|-----------------------------------------------|----------------------------------------------------|
| DATE                              | PERIOD                                        | FORM OF LAW                                        |
| To A. D. 400                      | HEROIC AGE OF<br>PAGAN DRUIDISM               | Oral Transmission                                  |
| A. D. 500                         | CHRISTIANITY and<br>INTELLECTUAL<br>EXPANSION | Formulation of<br>Principal Rules<br>of Brehon Law |
| A. D. 700                         |                                               |                                                    |
| A. D. 800<br>A. D. 1200           | INVASIONS of<br>DANES AND NORMANS             | Treatises and<br>Glosses on Codes                  |
| A. D. 1300<br>A. D. 1600          | CONQUEST by<br>ENGLISH                        | Brehon Law<br>disappears                           |



X. 11—FORUM AND BASILICA AT SILCHESTER, A. D. 200  
Roman rule replaced Keltic rule throughout Britain, and Druid justice disappeared

## 6. *Primitive Conditions*

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In the first period, or Heroic Age, pagan Druidism still flourishes and the law is transmitted only by memory of the Brehon judges. In the second period comes Christianity, and the formulation of the written rules of law. In the third period the Danish and the Norman invasions gradually paralyze all political progress, but the Brehon jurists continue to practice their law. In the fourth period the political ruin of Ireland is followed by the disappearance of Brehon law.

6. But even had Ireland been spared by destiny from the Danish and Norman and English invasions, the Keltic legal system would probably not have proved equal to the needs of new times. It was originally and remained primitive, in the legal sense, because based on clan life, and not on political unity. A deep devoted loyalty to clan and chief, when transmuted into national patriotism (as it came to be with the Germanic peoples) makes one of the noblest human traits; but when it remains concentrated on family or clan, it merely hinders political growth. The Irish Kelts were essentially pastoral; their only wealth, besides their gold ornaments, was their cattle. Of these, the chiefs owned the most, and the clansmen, renting their cattle from the chiefs, were in large part virtually serfs; and many chapters of the laws deal with the procedure of suit by distraint of cattle. Besides cattle-

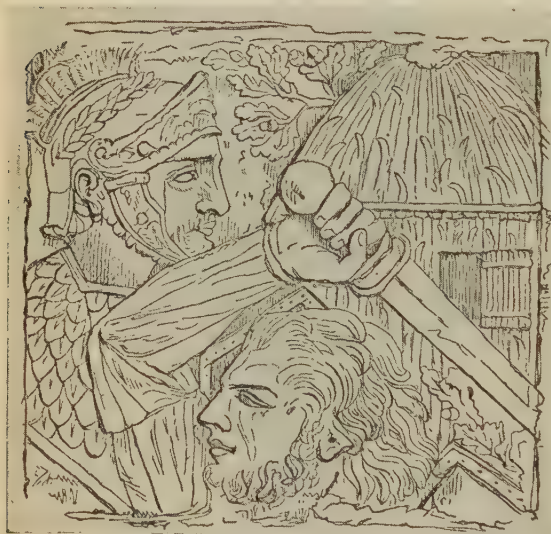


## *X. Keltic Legal System*

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raising, the chief occupation was fighting between the clans and raiding each other's cattle. A chronicler's encomium of King Dermot tells us, "There was no man living that was richer in cattle and gold and silver, nor one that made more raids on his neighbors." In this heroic age of pagan Druidism, and long after, the hero is the good fighter and raider.<sup>12</sup> The mightiest darling of the Irish legends is Cuchulain, who fought to the death for four consecutive days with his friend Ferdiad; and they kissed each other at the end of each day's fight! For the spirit of fighting was not hatred; it was rather that of sport,

dangerous adventure, and rivalry in manly prowess. It was a sociable thing to fight; in the west of Ireland a popular maxim still says, "It is better to be quarrelsome than to be



X. 12—A Keltic FIGHTER



## *7. Irish Kings and Assemblies*

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lonesome". From the earliest period down to the gentlemen's duels of the 1700's, Irish annals are full of anecdotes of friends fighting to the death, or if perhaps they survive, then shaking hands and embracing. And when that greatest of Irish patriots, Henry Grattan, denounced his bitterest parliamentary opponent as "an unimpeached traitor" (in the celebrated invective beginning, "Has the gentleman done?"), and a duel followed, the historian tells us that "the bloodshed brought about a reconciliation between the parties, who separated better friends than they had been for years"!<sup>aa</sup>

7. The most renowned fighting clan was the Fenians (whose name was afterwards taken by modern Irish rebels). The Fenians were the body-guard of King Cormac MacArt. Now this King Cormac MacArt, who lived about A. D. 250, was an historic character, and is important to us because he was revered as the first Irish legislator-king. "Cormac", says the early chronicle—and it is perhaps the first recorded Irish "bull"—"Cormac was absolutely the best king that ever reigned in Ireland before himself".

Cormac MacArt typifies the traditional golden age of Irish political annals. His capital was at Tara—the central spot, ever since, of Irish patriotic sentiment. In those days the hundreds of petty clan-chieftains were

## *X. Keltic Legal System*

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grouped under five local kings, or “ri”,—the kings of Ulster, Leinster, Connaught, Meath, and Munster; but these kings were under a chief king, or “ard-ri”, who lived at Tara.

Tara was in the county of Meath, not so far from Dublin, the capital of the new Irish Free State.<sup>13</sup> And “dail”, the name taken by the Parliament of the Irish Free State, is identical with “dal”, the ancient Keltic name for the assembly that met at Tara for declaring the law. “There is a great use among the Irish”, reported Edmund Spenser, “to make great assemblies together upon a rath, or hill, there to parley (as they say) about matters and wrongs between township and township or one private person and another.” These periodical assemblies (and there were scores of places of assembly, every clan had them) were the focus of the people’s life. Laws were enacted or modified, taxes were regulated, disputes were aired. There could be seen the Bards with their harps and eulogies; military drill and horse-races; fairs and feasting and merrymaking; for the assembly was the all-inclusive event of the season.

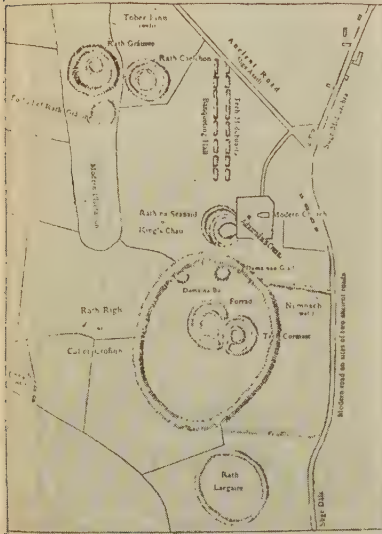
On the hill of Tara were many edifices. One of them, called the “forradh”, was the meeting-place of the “dal”; and the similarity of “forradh” and “forum” is an evidence from etymology of the prehistoric common origin of



X. 13—MAP OF IRELAND SHOWING TARA

[ 675 ]

## *X. Keltic Legal System*



X. 14—GROUND PLAN OF TARA  
The "forradh", within the large circular wall, was the meeting-place

Keltic and Latin races.<sup>14</sup>

8. But when an Irish king's assembly sat as a court, and listened to the judgments of a Brehon, it was usually called "ai-recht"; and the "Cul-Ai-recht", or chief court of Tara, was the court of last resort in Keltic Ireland. Three famous judgments, of this legendary period, may serve to illustrate how cattle-wealth and clan-fights were the staple material for the law.

The first is the judgment of the Brehon jurist Fintan. Fintan was one of King Cormac's judges, and the lawsuit was over the fight of two clans in the banquet-hall. The chiefs of the clans were Finn and Goll. Finn's clan had eleven hundred casualties, and Goll's lost only sixty-one. And the judgment of the Brehon in the suit for damages is that Finn was liable, for he started the fighting, but that he is freed from payment, having suffered such excessive loss in men!<sup>b</sup>

The second judgment is that of Dermot, in the lawsuit

## 8. *Judgments of the Brehons*

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brought by one of the early monks against St. Columba the missionary. St. Columba had borrowed from the monk a fine manuscript of the Gospels, and Columba had made a copy of the borrowed book, before returning it. The monk claimed the copy also as his; the saint disputed this. His argument in defence reads not unlike the defence made by modern infringers of copyright:° “I confess that the book in question was copied from the manuscript of Finnen. But it was with my own industry and toil and burning of the midnight oil. And it was copied with such care that Finnen’s manuscript is in no way injured by the act of copying. Moreover, my object was to preserve more surely the best parts of the book and employ them for the greater glory of God. Hence I do not admit that I have done any injury to Finnen; nor am liable for restitution, nor am at fault in any way.” But Dermot, the judge, as manuscripts were then new in Ireland, had no exact precedent, and he cast about for the nearest analogy. He found the Brehon maxim, “With every cow goes its calf”, “Le cach boin a boinin”; and so his judgment was in favor of the monk, because “Le cach lebar a lebran”, “With every book goes the young of the book”. (But the saint, it is recorded, was very angry at this judgment, invoked the power of a rival chieftain against Dermot, and thrashed him well in battle.)



## *X. Keltic Legal System*

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The third judgment is that of Cormac himself, before he became the great legislator-king. There was a lawsuit by one neighbor against another for the trespass of some sheep who had eaten all the woad-herb in his field. The people were assembled; and the judge was saying that the owner of the sheep should forfeit them to his neighbor, in payment for the herb consumed; when a youth (this was Cormac) started up from the back of the hall, and shouted: "Not so! For the herb is only the fleece of the earth. Therefore let not the whole sheep be forfeited, but only the sheep's wool be sheared, to pay for the herb; for herb and wool will both grow again". And the justice of this was so clear that the people shouted with one voice: "A wise young judge; he should be king". So they made Cormac a judge, and afterwards king.

The judgments above recounted, though perhaps reflecting well enough the spirit of Irish justice, are legendary only,—handed down in later chronicles of miscellaneous tradition. Contemporary records of the litigation—pleadings, judgments, arguments, reports of eye-witnesses—seem not to have been made. No such documents are extant, though copious must have been the oral pronouncements.

But there is extant one short book<sup>15a</sup> which is a sort of digest, in very concise form, of decisions attributed to



## *X. Keltic Legal System*

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a famous early judge—Caratnia the Scarred, said to have lived in the second century A. D. And it so happens that the manuscript containing it is the oldest one bearing an Irish law-text; it goes back to the 1100's; and the text itself dates as far back as the 700's. These decisions are composed in one of the oddest literary forms ever contrived to stimulate legal thought. The judge states his ruling in abstract terms, which are apparently (to one familiar with the law) paradoxical and unsound; the king questions it; and then the judge explains that he was here on the facts applying an exception to the rule. This quaint and ingenious composition has only fifty-one short paragraphs, but its learned translator remarks that after interpreting it "one feels as though he had undergone a stiff examination in Irish law":<sup>d</sup>

[*The Wrong Judgments of Caratnia.*] "Here follow the wrong judgments of Caratnia the Scarred. He was from the North, and was judge to King Conn of the Hundred Battles. He acquired great wealth. But his people maltreated him and deserted him; and he went to Conn's abode and was there healed. This Caratnia was deemed to blunder, when his judgments were heard by the many; but his judgments were correct, when examined by the few. Every case that was brought to Conn would be submitted by Conn to him. Then Conn would ask him, 'What judgment seems meet to you?' [The judgments are now stated in dialogue between Caratnia and Conn.]

"1. 'I decided, A bargain, after a night has elapsed, cannot be revoked'.—'You decided wrongly', said Conn.—'I did it wisely', said Caratnia, 'for it was a silver thing, and its defect was concealed'.

## 8. *Judgments of the Brehons*

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"2. 'I decided, A contract for plowing with another man's oxen can be revoked'.—'You decided wrongly', said Conn.—'I did it wisely, for the other man's oxen were taken away from him'.

"3. 'I decided, The bard cannot claim pay for his hired eulogy'.—'You decided wrongly', said Conn.—'I did it wisely; for it was sly praise, which amounted to a sneer'.

"4. 'I decided, The tools of the smith descended to a relative not craft-skilled'.—'You decided wrongly', said Conn.—'I did it wisely, for the relative was his son, who has first claim'.

"5. 'I decided, A bondwoman wife must share the cost of her child's upbringing'.—'You decided wrongly', said Conn.—'I did it wisely, for the child's father was himself a bondman'.

"6. 'I decided, The surety for a son who contracts [without capacity] in his father's lifetime must pay'.—'You decided wrongly', said Conn.—'I did it wisely, for the contract was for purchasing a wife and hiring land'.

"7. 'I decided, An iron tool is acceptable as a pledge'.—'You decided wrongly'.—'I did it wisely, for this was a pledge to secure a liability for building a party-wall'.

"8. 'I decided, The contract is binding, though the thing received was of less value'.—'You decided wrongly'.—'I did it wisely, for every adult man must suffer being overreached'.

"9. 'I decided, The first choice of lands when an inheritance is divided lies with the eldest son-heir, without casting lots for it'.—'You decided wrongly'.—'I did it wisely, for in this case the younger yielded first choice to the elder without lots, even though it might be worse for him'.

"10. 'I decided, The stealing of a morsel may go free of penalty'.—'You decided wrongly'.—'I did it wisely, for here it was a homeless outcast who eat it'.



## *X. Keltic Legal System*

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"11. 'I decided, For trespass by bees a pledge must be lodged with one's neighbor'.—'You decided wrongly'.—'I did it wisely, for no one need supply feed to his neighbor gratis'.

"12. 'I decided, The whole cost of the child's upbringing falls on the mother only'.—'You decided wrongly'.—'I did it wisely, for this was the child of a slut, which the father had not acknowledged before she sought to shuffle off liability'.

"13. 'I decided, Excessive advantages in family shares may be retained'.—'You decided wrongly'.—'I did it wisely, for here the spouses, though not bringing equal marriage portions, were entitled to spend equally for family expenses'.

"14. 'I decided, The gravid wife may be freed from a penalty'.—'You decided wrongly'.—'I did it wisely, it was a matter of saving life; the infant was not brought to birth'.

"15. 'I decided, One of the animals put out to pasture on hired land may be kept by the land-owner'.—'You decided wrongly'.—'I did it wisely, for the animal, being kept as pay, was not of greater value than the rent'.

"16. 'I decided, For breach of a clan-truce no fine need be paid'.—'You decided wrongly'.—'I did it wisely, for here the accused was wounding in defence of his life'.

"17. 'I decided, An overpayment may be pleaded against a debtor'.—'You decided wrongly'.—'I did it wisely, for here it was a surety and a creditor, who pursued their claim until the debtor yielded'.

"18. 'I decided, One oath makes good proof against two'.—'You decided wrongly'.—'I did it wisely, for the one oath was of a competent man who prosecuted two infamous men for a misdeed'.

"19. 'I decided, Harm by an animal is payable like harm by a human [i. e. the full penalty-amount, not merely compensation]'.—'You decided wrongly'.—'I did it wisely, for here the animal had



## 8. *Judgments of the Brehons*

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been kept by its owner after once doing harm and was notoriously vicious'.

"20. 'I decided, Harm by a human is payable like harm by an animal'.—'You decided wrongly'.—'I did it wisely, for harm by a minor or without intention calls only for compensation, not fine also'.

"21. 'I decided, Harm done by a shepherd-dog carries no penalty'.—'You decided wrongly'.—'I did it wisely, for here it was attacked by animals that it had not hurt'.

"22. 'I decided, The chief has not the power of judgment over his underlings'.—'You decided wrongly'.—'I did it wisely, for here the chief was disqualified as to his underlings'.

"23. 'I decided, Children's contracts are binding on both sides'.—'You decided wrongly'.—'I did it wisely, for here it was an exchange of goods, made openly and without overreaching'.

"24. 'I decided, A king's arrival [with ceremonies] does not excuse failure to fulfill one's attendance at court'.—'You decided wrongly'.—'I did it wisely, for here the king himself was to hold the court for this party'.

"25. 'I decided, The exemption of a bard's cattle from attachment for debts of his followers is lost'.—'You decided wrongly'.—'I did it wisely, because the bard's followers exceeded the lawful number'.

"26. 'I decided, The injured man, taken in with his followers by the injurer under his duty of treatment, need not be kept till the ninth day'.—'You decided wrongly'.—'I did it wisely, for a skilled physician pronounced that the man would be dead at the month's end, and the fine for death relieves the injurer from the usual duty to support for nine days'.

"27. 'I decided, Liability for death accrues against him who is commissioned by his family-chief to fight in a regular duel'.—'You

## *X. Keltic Legal System*

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decided wrongly'.—'I did it wisely, for the man killed was feudal superior to the killer, and no necessity compelled the killing'.

"28. 'I decided, The clan does not share liability for the misdeed of one who by purchase became an adoptive member'.—'You decided wrongly'.—'I did it wisely, for here the conditions of purchasing membership were not fulfilled'.

"29. 'I decided, The son is free from the duty to support his father in old age'.—'You decided wrongly'.—'I did it wisely, for here the father had sold the son as a serf, and the duty to support had ceased'.

"30. 'I decided, On division of property at divorce, the wife receives no share representing the fruits of her household toil, in spite of her service having been faithful'.—'You decided wrongly'.—'I did it wisely, for here the wife had waived her right when marrying a man of higher rank'.

"31. 'I decided, A garment may be seized as a pledge'.—'You decided wrongly'.—'I did it wisely, for here the pledge was one required to be redeemed before nightfall'.

"32. 'I decided, The chief's share of head-money for killing of a clansman need not be paid'.—'You decided wrongly'.—'I did it wisely, for here there was a counter-claim due from him'.

"33. 'I decided, No fine is imposed for negligence on a bystander who by inaction causes the death of a helpless person'.—'You decided wrongly'.—'I did it wisely, for here the bystander himself scarcely escaped the same death'.

"34. 'I decided, The oath of a woman against a cleric is void'.—'You decided wrongly'.—'I did it wisely, for here the suit was by one cleric against another'.

"35. 'I decided, Of a treasure found no share goes to the rear man of those who chanced upon it'.—'You decided wrongly'.—'I did it wisely, for the rear man here was blind, who did not share the sight of it'.

## 8. *Judgments of the Brehons*

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"36. 'I decided, He who takes possession of land in good faith as claimant obtains permanent possession'.—'You decided wrongly'.—'I did it wisely, for the one dispossessed had neither ownership nor consent of the owner'.

"37. 'I decided, In a suit for injury to a chief, only one "cual" [= 3 cows] was awarded'.—'You decided wrongly [for the head-money of a chief is 7 "cual"]'.—'I did it wisely, for here the insult was to the widow of a chief, and she was the mother of seven chiefs; therefore each claimant received only one "cual"'.

"38. 'I decided, To the woman who makes no outcry when forced, the fine is none the less payable'.—'You decided wrongly'.—'I did it wisely, for here she was forced in the wilderness'.

"39. 'I decided, No fine is imposed for improper seizure of a man's wife in the guest-house'.—'You decided wrongly'.—'I did it wisely, for a wife among the house-serfs without the protection of her husband is deemed for the time not his wife'.

"40. 'I decided, The deposit need not be restored'.—'You decided wrongly'.—'I did it wisely, for this deposit perished with the goods of the depositary'.

"41. 'I decided a case on hearing one party only'.—'You decided wrongly'.—'I did it wisely, for the opponent in this case could not be found, and I decided after considering his side'.

"42. 'I decided, The husband is freed from paying fine to the wife's family for causing her death'.—'You decided wrongly'.—'I did it wisely, for this wife was his by the family's consent and died in childbirth'.

"43. 'I decided, The bride-price is to be paid back to the husband even after consummation of the marriage'.—'You decided wrongly'.—'I did it wisely, for here the marriage was for a term and the wife had deserted the husband before the term expired'.

"44. 'I decided, The liability of a serf for a misdeed is shared by

## *X. Keltic Legal System*

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another serf'.—'You decided wrongly'.—'I did it wisely, for here the other serf had harbored the first'.

"45. 'I decided, The man who brings complaint according to law is oathworthy'.—'You decided wrongly'.—'I did it wisely, for here his oath was fortified by one of the seven "rocks" of proof'.

"46. 'I decided, For a bard's song composed on the spot and therefore inadequate, the regular fee must be paid'.—'You decided wrongly'.—'I did it wisely, for this was a song to invoke magic and must therefore be extemporized'.

"47. 'I decided, The recaption of a pledge by the pledgor does not make him liable'.—'You decided wrongly'.—'I did it wisely, for this was a pledge unlawfully taken'.

"48. 'I decided, The pound for keeping a pledge seized may be outside of clan-territory'.—'You decided wrongly'.—'I did it wisely, for the seizer here acted for a creditor in the other territory'.

"49. 'I decided, A surety may repudiate the suretyship'.—'You decided wrongly'.—'I did it wisely, for this was a case where the man had been erroneously made surety against his will'.

"50. 'I decided, The chief cannot claim that his honor was injured, in spite of the bard's insulting song'.—'You decided wrongly'.—'I did it wisely, for here the chief then demanded a eulogy, and it more than made up for the insult'.

"51. 'I decided, No head-money is payable for a treacherous killing'.—'You decided wrongly'.—'I did it wisely, for here there was a set-off for seven deeds of violence on the other side'".

9. The great King Cormac is said to have been the author of the earliest law-book, the *Lebar Aicle*, or *Book of Aicill*, a kind of criminal code. But 'twas not he that wrote it. That book must have been made centuries later. In Cormac's day, the Irish, like all Kelts, had no writing



X. 16—PATHRIC CAUSING THE IRISH CUSTOMS TO BE WRITTEN DOWN



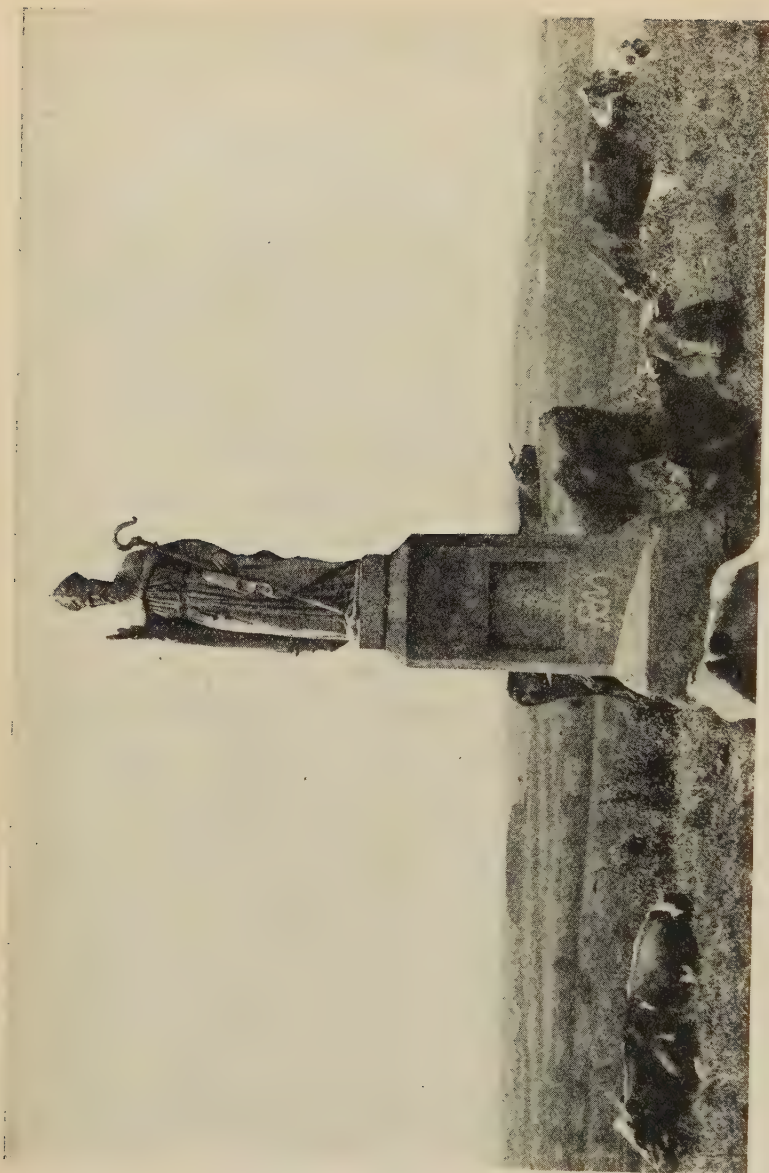


## 9. *Irish Customs Recorded*

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and no written records. They had indeed the runes, called in Irish "ogham"; but these were only crude symbols, used mainly for burial inscriptions and the like.

The first credible reduction of the customs to writing came after Christianity had brought the Roman alphabet, and is attributed to St. Pathric himself.<sup>16</sup> He arrived in Ireland as a missionary about A. D. 430, and a few years later (perhaps A. D. 440) is said to have persuaded King O'Leary to authorize the ancient customs to be written down. This was done by a commission of three chiefs, three bishops and three Brehons, or jurists. The code was drafted at Tara, mainly by Dubhtach, the chief Brehon judge, and was duly approved by King O'Leary. It was afterwards known as the "Senchus Mor", or Great Custom,—a name like that of "Grand Coutumier" in Normandy. But in the early days it was often called "Cain Pathraic", or Code of Pathric. And at Tara, where it was done, a statue of the saint<sup>17</sup> now stands. Pathric, though a Kelt by birth, was a Roman citizen, and perhaps the son of a Roman magistrate; and he *may* have heard of the new code of the Roman emperor Theodosius, which had just been published in A. D. 438. But though it owes its origin to the arrival of Latin Christianity, the book is purely Keltic throughout. The entire Irish legal vocabulary was native Keltic, and highly technical, in a class by itself.



X. 17—STATUE OF ST. PATRICK ON TARA HILL

## 10. *Irish Literary Leadership*

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10. This early acceptance of Christianity by the Irish, under St. Pathric, and under his equally famous successor St. Columba,<sup>18</sup> came at a time when western continental Europe was being overrun by the pagan Germanic invaders. Christianity and Latin literature in Gaul were being overwhelmed.



X. 18.—ST. COLUMBA WINNING THE KELTS

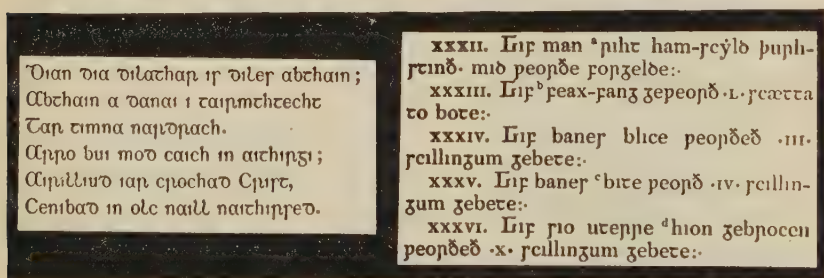
But the Irish had embraced the new religion with emotional enthusiasm. Whole clans were baptized at once.

The Irish now became the pioneers of religion and literature in Western Europe. As missionaries, they traveled and planted the Cross as far away as Italy. For three centuries, from A. D. 500 to 800, until the time of Charlemagne, Ireland was the intellectual centre of the West (as all authorities agree). It was the Irish monks who alone kept up Latin as a literature, not merely a language. And it was they alone who knew the Greek language. They multiplied manuscripts assiduously;

## X. *Keltic Legal System*

they were the first to use decorated capital letters; and the art of illumination was lovingly developed to an almost incredible degree. The Book of Kells, a gospel manuscript, has been pronounced by some to be the finest example of illumination extant in the world; and the literary treasures of this period in Ireland that have been since destroyed by the wars are legion in number. The Anglo-Saxons of that day literally learned their letters from the Irish missionaries; and hence it happens, oddly enough, that the script of our earliest Saxon English law-books uses the Irish alphabet;<sup>20</sup> it looks foreign, but it is really only a modified Roman alphabet, with special forms for the letters *g*, *n*, and *s*.

11. In these three flourishing centuries, A. D. 500-800, the Brehon law entered upon its second stage. The Druid jurists, converted wholesale to Christianity,<sup>e</sup> and now acquiring the art of script, applied their trained pro-



X. 20—IRISH AND SAXON LAW SCRIPT, COMPARED  
The Irish is at the left, the Saxon at the right



## 11. *Irish Law-Treatises*

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fessional minds to the formulation of the law. The hundreds of precedents and rules which they had hitherto handed down by memory were now reduced to writing by the end of this period.

But the *Senchus Mor*, the *Book of Aicill* and the other Keltic law-books, were not legislative codes. They were rather treatises for the instruction of their student-apprentices; for there was an elaborate system of instruction, with numerous grades. The text of these Keltic books, both Irish and Welsh, contains few generalizations of principle; it never even approached the Roman height of Gaius. Chiefly, it lists thousands of detailed rules for concrete cases. And these cases were largely imaginary,—not actual judgments, but mere feats of logical exercise; and were arranged in artificial groupings with fanciful phrasings. The following passage, from the law of distraint, illustrates the general style; here the larger type shows the older original text, and the smaller type the later glosses or comments of various jurists or teachers:<sup>f</sup>

SENCHUS MOR, *Of the Four Kinds of Distress*: “For distress (‘athghabhail’) is a general name for every security by which every one recovers his right. ‘Athghabhail’ is that which renders good to the good, which renders evil to the evil, which renders good to the good, which takes the guilty for his guilt. The man who is attacked obtains ‘eric’-fine.

## X. Keltic Legal System

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[Gloss.] "*For distress* ('athghabhail') i. e. because it is a general name for every true perfect method by which one recovers what he is entitled to according to rectitude, i. e. that thing is 'athghabhail.' Whatever method it may be by which one recovers may be called 'athghabhail.' '*Which renders good to the good*,' i. e. good is rendered unto the good. '*Renders evil to the evil*', i. e. it renders evil to the person who does not do good with his possessions. '*Which takes the guilty for his guilt*', i. e. every guilty person is taken for his guilt when 'eric'-fine is not obtained. '*The man who is attacked obtains "eric"-fine*,' i. e. the man against whom the attack is made received 'eric'-fine according to the extent to which he has been injured . .

"Stays were ordained for distresses, and two notices were appointed for every distress without exemption and without defect; a notice of five days to the defendant, and a notice of ten days in the case of the inferior grade. If it be distress on account of a kinsman that is taken, they (the Feini) legalized the quadruple division of the notice for the distress, but they did not legalize stays or delays in pound, except a delay in pound of one day only. This thing was, however, afterwards changed forever, so that there are *now* four stays, and four delays in pound, and two notices.

"Notice precedes every distress in the case of inferior grade, but no notice is served on a wanderer, or one who has no fixed residence. Give five days legal notice before distress be taken from a defendant, if notice be served at all, that he may have his property in readiness for a pledge, for judgment, for consultation, for adjustment, for contracts. . . . .

"'*Stays were ordained for distresses*', i. e. one day, and three days, and five days, and ten days, i. e. distinct stays were appointed for the quick or lawful distresses. '*Two notices were appointed for every distress*', i. e. two notices were fixed or established, i. e. a notice upon the debtor, and a notice upon the kinsman. '*Without exemption*', i. e. disease; for it is not served during an exemption, i. e. when the defendant has a disease. '*Without defect*', i. e. without 'irrad:' for if

## 11. Irish Law-Treatises

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he has either of these things, the notice shall not be served on him, (i. e. for if he has exemption it would be idle to serve the notice). '*A notice of five days to the defendant*', i. e. upon the debtor of the inferior grades, i. e. not to serve a shorter notice than five days upon a debtor of the inferior grades. '*A notice of ten days in the case of the inferior grade*', i. e. upon the tribesman who is a kinsman to one of the inferior grade. . . . .

" '*Notice precedes every distress*', i. e. I deem it right that notice should be served on the inferior grades before distress be taken from them, and it is doubtful whether it is for a crime or a debt in this case. '*But no notice is served on a wanderer*', i. e. I make an exception here; no notice is served upon any wanderer who has not a fixed residence or place of abode, i. e. a notice of five days (i. e. longer than the notice which should have been given to the wanderer), is served upon the defendant, according to law, before the taking of distress from him, if it be right that notice should be given, i. e. to answer for the non-appearance of him (i. e. the wanderer). '*Or one who has no fixed residence*', i. e. whose residence is not known. . . .

"How is it carried off? How is it kept? How is notice given respecting it? How is it sought back with worthiness of the kinsman? Three carry it out to four persons . .

'*How is it carried off?*' i. e. how is it driven out? i. e. three drive it out to four persons. '*How is it kept?*' i. e. how is it brought out without fodder, without food? i. e. it is into a lawful pound it is brought. '*How is notice given respecting it?*' i. e. how is the notice brought? i. e. it is a notice by the track of the cattle, or a notice of the third word. '*How is it sought back?*' i. e. how is the '*urnaídh*' of the distress of the kinsman brought? By worthiness.

" '*Three carry it out to four persons*', i. e. three persons carry it to the four persons who are outside, i. e. the four are awaiting it, and the three persons carry the distress out, i. e. a pledgeman (that is an advocate), a witness, a plaintiff. The four persons are, a witness, a plaintiff, a surety, and a hostage, i. e. who has honor-price, awaiting it at the pound of the plaintiff, i. e. the plaintiff is not obliged to have any one with him at the taking of the distress from a debtor, if he himself knows how to take it; and he may bring it to his own pound at once, whether the distress be great or small, and keep it there

## X. *Keltic Legal System*

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during the period of delay in pound, and during the period of forfeiture, until it become all forfeited."

The Brehon books are full of passages composed apparently by the fraternity of speculative jurists to exercise their logical acumen. For example, in one Irish book—the book of *Aicill*<sup>21</sup>—there are four pages of hair-splitting rules about liability for injury to dogs in a dog-fight; two pages about damage done by a fool in an ale-house; forty pages on the law of bees. Oddest of all, we find five pages on liability for damage caused by shouting at a pig and making it run into a person, and herein many subtle distinctions between shouting done by a youth, by an adult, by an idler, and by a working-man, and shouting malicious, playful, necessary, and non-necessary; thus:<sup>g</sup>

[*Book of Aicill*, p. 243.] [Text] "The exemption of pigs at the trough or in the sty.

[Comment] "That is, should a person shout, the pig is exempt as regards injury to the idler who is behind the person who shouted, and beside the person who shouted and between the person who shouted and her [the pig], in case the person who shouted is himself an idler, since it is his shouting that incites her against all the other idlers; and there is half fine upon her owner for injuring the profitable worker, whilst the excitement caused by the shout is upon her, and when it has gone off her, there is half fine from her owner for injuring the idler, and full fine for injuring the profitable worker.

"For the injuries from the malicious shouting of a sensible adult there shall be paid the full 'dire'-fine of the wound until death, whether profitable workers, idlers, or animals be injured, and full body-price after death for injuring persons, and full 'dire'-fine for injuring animals.







## *X. Keltic Legal System*

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"For the injuries from the playful shouting of a sensible adult, there shall be paid half 'dire'-fine of the wound until death in the case of profitable workers and animals, six-sevenths of sick-maintenance until death for idlers, half body-price after death for persons, and half 'dire'-fine for animals.

"For the injuries from the shouting for unnecessary profit by a sensible adult, there shall be paid six-sevenths of sick-maintenance until death in the case of profitable workers, and six-sevenths of compensation after death; six-sevenths of sick-maintenance until death for idlers, and three-sevenths of compensation after death: four-fifths of sick-maintenance until death for a cow, and four-fifths of compensation after death; half sick-maintenance until death for a horse, and half compensation after death.

"For the injuries from the malicious shouting of a youth at the age of paying half 'dire'-fine, there shall be paid half 'dire'-fine . . . [etc., etc.]"

"For the injuries from the playful shouting of a youth at the age of paying half 'dire'-fine, there shall be paid . . . [etc., etc.].

"For the injuries from the shouting for unnecessary profit, of a youth at the age of paying half 'dire'-fine, there shall be paid . . . [etc., etc.]

"For the injuries from the malicious shouting of a youth at the age of paying compensation, there shall be paid . . . [etc., etc.]

"For injuries from the shouting for unnecessary profit of a youth at the age of paying compensation there is paid . . . [etc., etc.]

"'Idle shouting' means the doing of it for the purpose of sport, and it is not sport with respect to the pigs; and if it were, it should be considered as idleness of foul play, and there would be full fine for it. 'Malicious shouting' means doing of it (the shouting) with a view to injury. 'Shouting for necessary profit' means shouting for the purpose of driving cattle out of fields of grass, or of cornfields, when they could not have been driven thence in a more lawful

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Q

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5. *remach* *quasi* *conspicibilis*

... ..

## *X. Keltic Legal System*

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manner; or, according to others, it means shouting before a plundering party. 'Shouting for unnecessary profit' means the doing of it (the shouting) in order to drive cattle out of fields of grass or corn-fields, when it (the driving out) could have been done in a more lawful manner."

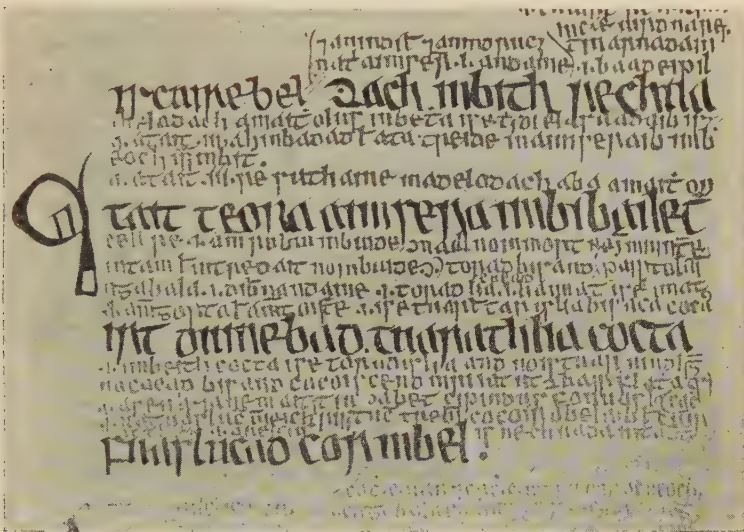
The alphabet of the Irish language was merely the Roman letters, as introduced by Pathric, with a few changes.<sup>22</sup> But the technical words of law were understood only by the professional Brehons; and the pages of the law manuscripts were written with a weird but studied irregularity which has never been practiced in any other civilized language. For example, if we take a sample passage, consisting of four lines of text in large letters and seventeen lines of commentary interlined in small letters, the order of the lines, in reading, is as follows:<sup>22a</sup> Imagine the lines in large script to be lettered A, B, C, D; and the small lines in between to be numbered 1, 2, 3, 4, from the top, down to 17; then they are read in the following order:

The large script lines thus: B, A, C, D.

The small script lines thus: 8, 7, 6, 5, then part of 4 and 3, then the rest of 4 and 3, then 2, 1, then 9, part of 12 and 11, then 12, 10, 13, 14, part of 16 and 17, then 15, and then the rest of 17!

How to read these books was the secret of the Brehons; and the living knowledge of this technical language dis-

## 11. Irish Law-Treatises



X. 22a—THE SENCHUS MOR: SAMPLE PAGE, ENLARGED

This enlargement shows the lines just below the middle of the left column in No. 22. The order of words and lines was artificial, and the secret was the possession of the Brehons

appeared with the last teacher of Irish law three centuries ago. Even the manuscripts themselves are now rare. And so few modern scholars can be found to master them that the task of deciphering and translating these few hundred pages of parchment, undertaken officially about 1852, occupied fifty years to finish.

12. The Welsh Code was not written down until about A. D. 900, some five hundred years later than St. Pathric's day in Ireland. King Howel the Good, after

## *X. Keltic Legal System*

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whom the code is named, convened an assembly of all the chieftains, bishops, and jurists, to record the ancient customs. This Code of Howel the Good, or “Hyvreithu Huwel Dda”, was then preserved in three copies. One was deposited at Dynevor in South Wales; one was kept at Howel’s Castle of Aberfraw, on the island of Mona (or Anglesey); and one copy went about with the king himself. The manuscript most prized has been termed “Llyvr Teg”, the Fair Book, from the excellence of the calligraphy.<sup>23</sup> Howel the Good dispensed justice in his great hall at Aberfraw, and so constant was his justice that his chief judge took the king’s place at night, and there was never a moment when the suitor could not come for redress. Sketches of the judge and the king, made by the scribe, have been found on the oldest extant manuscript.<sup>24</sup>

This code was first written down long before Justinian’s books were revived in Italy, and it seems purely Keltic, from beginning to end. And yet, one of the evidences of the subtle wide influence of the revived Roman law of the 1100’s is that in some mysterious way (presumably at a later revision) the famous phrase of Justinian’s opening chapter (which is found also borrowed in Bracton and in early Slavic books) is here found embedded, word for word, in the Welsh language, in the



**H**ollid di mab laddell brechlin  
 dymirp oll awoles p gymirp m  
 am aruer o: kyfradieu: a dyf  
 ynniad aitas hpt vtr gymirp  
 ardal dwegrp: obob llaucrer  
 ynglirp: p pediar onadiunt  
 yn llygryon. ar deil. yn psotheigpon. Def  
 aduws p dymirp m p gollieigpon: rac  
 ddi o: llygryon pethu a dei yn erbyn m  
 ynglirp: lan. Def amler p doethant yno: n  
 gwallip. Def achaw p doethant p gwallip:  
 bith dylu o baw hor ynglirp: yhr amler  
 glendip: homur: ac m gndei gam m m am  
 der glendip. ac ogyghor: a dyflynedigaeth  
 p doethon p doethant yno: p hen gyfridieu  
 a dyf: allant: a rei onadiunt a adassant p  
 reder: ac ereill ac m endunassant: ac ereill m  
 gweill adilassant: ac ereill on eisio adilassant  
 lant. a gwey homu onadiunt p kyfridieu  
 eu a vanaassant eu ladd. a homel a roas  
 p adardant adunt: ac a dyflyn p m m ad  
 eu ladd ynglirp: ac ynglirp: a homel  
 ar doethon a miant rapt ac ef a othodaf  
 lant: ar homu gymirp oll ar yneb raptm  
 m a llaucrer p kyfridieu heb eu ladd: ac  
 a othodassant eu hemellirp ar m ygnat a

Peniarth MS 32 folio 1.

The National Library of Wales.

X. 23—WELSH LAWS OF HOWEL THE GOOD  
 Called "The Fair Book", because of its clear script

## X. *Keltic Legal System*

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X. 24—THE JUDGE AND THE KING

The oldest manuscript is embellished with these drawings from life

middle of Book XIV (c. XX, par. 23), "Three things the law enjoins upon all: to live honestly; to cause no vexation or harm to another; and to render to every one his due."

The marked literary peculiarity of the Welsh Code is that almost every rule is fancifully forced into a "triad", as it is called. Thus:<sup>b</sup>

"Three things are not to be redressed: a thought, a frown, and an intent without an act.

"Three things are to be confined: a man, for an act which merits it; a beast, for damaging corn or hay; and a bird, when proper.

"Three things a chief is to listen to: a just claim, a just defence, and a just petition.

## 12. *Welsh Law-Books*

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"Three things which neither a lord, nor a judge, is to listen to: a claim contrary to law; a claim which the law has previously investigated; and a claim in respect to which there has been previously a compromise between the plaintiff and the defendant.

"There are three discharges of recognizance in a cause: a counter-swearing; a vendor's warranty; and idiotcy: since there is no obligation then to answer.

"Three cases wherein denial and confession are of the same effect: where a verdict shall fail, in respect to a claim that is preferred; where guardians shall fail, in respect to a claim of theft; and the third case is proof.

"XXI. [of Voucher.] Three matters which need to be particularly named: a vouchee; a guardian; and a witness. . . .

"Three vouchees which comprize neither denial nor confession: a vouchee of law, or justice, that the claim is not to be answered, and declaring the cause; a vouchee of proved privilege, so that a defendant shall not be bound to answer; and a vouchee of lack of privilege on the claimant's part, so that he ought not to be answered, or of his being exceptionable by law.

"Three cases where a claimant and a defendant assign their vouchee to the same mouth: one, in the mouth of an acknowledged surety; the second is, in the mouth of a judge, as to how the judgment was pronounced; third, in the mouth of a lord, of there having previously been an adjudication as to the cause which is under discussion.

"Three cases where a person places himself as a vouchee: one is, to swear to his property, and to preserve his ownership of his own; the second is, a defendant proving birth and rearing of an animal by himself; the third is, proving custody before the loss of his property, and that it went not from his vouchee. . . .

"Three things are necessary to be lawfully made, before any one shall be adjudged as losing, or gaining, in the presence of an upright judge: a complaint; a summons; and a demand. . . .

## *X. Keltic Legal System*

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"Three things which liberate a defendant from a claim: a judgment; a lawfully established vouchee; and a verdict. . . .

"XXII. [of Bonds.] There are three bonds: a suretyship; a contract; and an oath: hire and exchange are appropriately proceeded for by one of these ways. . . .

"Three kinds of bonds which one person enters into with another: a mutual bond, and that is a complete bond; an incomplete bond; and a futile bond.

"There are three lawful mutual bonds: suretyship; contract; and an oath. . . .

"XXIII. [of Oaths.] There are three kinds of lawful oaths: a complete oath; a loose oath; and a futile oath.

"There are three kinds of complete oaths in law: swearing to truth through and through; the second is, denying falsehood through and through; thirdly, doubt: a perfect oath means complete swearing."

13. These Keltic Codes, or at least the early Irish ones, were purely Keltic, and are therefore priceless for the study of comparative law. But they were influenced by one foreign element, viz., the new Gospel of Christianity. This influence is clearly seen in the very opening chapter of the *Senchus Mor*, the code said to have been compiled at St. Pathric's demand. For it tells how Pathric found the blood-feud in vogue, by which every killing led to a family or clan vendetta, but the wrong could always be settled by payment of a fixed sum, called "eric", like the Saxon "wergeld". Now Pathric, in the name of Christianity, insisted that the murderer should

### 13. *Keltic and English Justice*

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be solemnly condemned as a criminal and not be either copied by retaliation in kind or let off with a payment of money. And so in the opening chapter it is recorded, "There shall be no vengeance by the family, but each man for his crime shall suffer the death of a criminal"; and the ancient custom was abolished of "cos i cois, oculus suil a suil, oculus ainm i-naimn", "a foot for a foot, an eye for an eye, and a life for a life".

But alas! Pathric's reform never took solid root, neither then nor for a thousand years. The deep-seated Keltic racial idea was that a homicide is a family or clan affair, and may be either avenged by retaliation or settled by payment, but that it is emphatically *not* a matter for state interference in the interest of law and order. (This sentiment survives yet in the Keltic stock of the mountains of southeastern United States.) And when the English took possession of Ireland, long after, nothing shocked their sober sense of law and order more deeply than this Keltic practice of buying off a homicide. Edmund Spenser, in his discourse on "the Present State of Ireland" (A. D. 1596), thus recorded the English view:<sup>1</sup>

"Eudoxus. What is that which you call the Brehon law? it is a word unto us altogether unknown.

"Irenius. It is a certain rule of right, unwritten, but delivered by tradition from one to another, in which oftentimes there appeareth great shew of equity, in determining the right between party



## *X. Keltic Legal System*

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and party, but in many things repugning quite from God's law and man, as for example, in the case of murder. The Brehon, that is their judge, will compound between the murderer and the friends of the party murdered, which prosecute the action, that the malefactor shall give unto them, or to the child or wife of him that is slain, a recompence, which they call an Iriach; by which vile law of theirs many murders are amongst them made up and smothered. And this judge being, as he is called, the Lord Brehon, adjudgeth for the most part a better share unto his Lord, that is the Lord of the soyle, or the head of that septe, and also unto himself, for his judgment, a greater portion than unto the plaintiffs or parties grieved.

"Eudoxus. That is a most wicked law indeed."

And a famous case, which occurred ten centuries after St. Pathric's day, exhibits that trait, and illustrates how hard it was for the two races to understand each other. This was the case of James Lynch (which by a complete twist of meaning has led in modern times to the term "lynch law"). In the early 1400's, Lynch was mayor and judge in Galway, in the north, where the English were in control. Lynch's hot-blooded son was jealous of the attentions paid to a certain maiden by a young Spanish visitor, a guest in his father's house.<sup>25</sup> The son foully killed the guest. Lynch the father held court upon his son, condemned him to death, solemnly took the last sacrament with him, and then, since none other could be found to do the act, he executed his son with his own hand in the market-place. Lynch the father went back into his

### 13. *Keltic and English Justice*

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house, in stern grief, and never left it again in life. At that same period, Brehon judges were still permitting homicide to be compounded with money; and the Irish were deeply shocked at Lynch's type of stern penal justice.

#### (III) THIRD PERIOD

##### THE DISSOLUTION OF THE KELTIC SYSTEM

These two branches of the Keltic system, after a gradual decline, perished within a century of each other. In both cases the end came by force of conquest.

14. The Welsh was the first to end. For two centuries after the Norman conquest of England the Welsh



X. 25—JUDGE LYNCH'S HOUSE AT GALWAY

## *X. Keltic Legal System*

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X. 26—STATUE OF LLEWELLYN  
THE GREAT  
Now in the square at Conway

had held out in their mountains and valleys of the west coast. In the late 1100's, came Llewellyn the Great, the best ruling mind that had ever arisen in Wales; he is still their national hero.<sup>26</sup> He made a last effort to unite the Keltic tribal factions of his people, by establishing a national council, which he summoned at Aberdovey, in one of the picturesque valleys of the coast. In almost the same year, John of England was calling a great council at Oxford, which later did become a national English par-

liament of laws. But Llewellyn's council met the opposite destiny. It did not survive his own life.

Once later, indeed, in the 1400's, Owen Glendower (the Welsh hero whose picturesque character has been enshrined by Shakespeare) did make a final similar effort by summoning at Machynlleth the last Welsh semblance of a parliament; and the house of his parliament is still pointed out.<sup>27</sup> But his power was broken by Henry Hotspur, and this last effort failed.

In the meantime, however, in 1215, had come Magna Carta to save for a while the ancient laws of Wales; for

## 14. *End of Welsh Law*

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X. 27—OWEN GLENDOWER'S PARLIAMENT HOUSE

Llewellyn the Great had joined the English barons in their successful struggle against King John, and, as his reward, chapter fifty-six of Magna Carta<sup>28</sup> provided that Llewellyn's son, who had been held by John as a hostage, should be given back, and that disputes over land held in Wales should be decided by the law of Wales.<sup>3</sup>

"[As to the lands and liberties of Welshmen] if a dispute arise over this, let it be decided in the Marches [borders] by the judgment of their peers, for tenements in England according to the laws of England and for tenements in Wales according to the law of Wales."

And so for a while Welsh law was preserved for Wales. But by seventy years later a far different king from the





X. 28—MAGNA CARTA, CHAPTER 56

In this chapter the law of Wales was preserved "for tenements in Wales"



## 14. *End of Welsh Law*

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weak King John had resumed the task of subduing Wales. Edward I, the great organizer, was building around Wales a ring of powerful castles, whence he could muster his armed forces. In the year 1284, after crushing the power of Llewellyn the Great's grandson (another Llewellyn, and an equally courageous Welsh leader), Edward I called an English parliament at one of these great castles, Rhuddlan;<sup>29</sup> and there was enacted the statute of Rhuddlan, 12 Edward I, which made Wales an appanage of the English crown, and forever ended the political independence of the Welsh. And in that same year, at Carnarvon



X. 29—RHUDDLAN CASTLE

## *X. Keltic Legal System*

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in Wales, where soon was to arise Edward's greatest castle of defence, was born the king's son Edward, who was now given the new English title of Prince of Wales, to emphasize the new political status of Wales. Edward I, as tradition has it, had placated the Welsh people by promising them that he would give them a native prince, one who could speak no other tongue than their own; and this promise he fulfilled to the letter, but to the letter only, by displaying to them this speechless babe of his, born on Welsh territory.

But the statute of Rhuddlan, though it annexed Wales to England, did indeed leave to the Welsh for a while their ancient laws; for the preamble declares that Edward, having caused "the laws and customs hitherto used to be recited before us and our nobles, some of the laws we have allowed to remain, some we have amended, and some others we have decreed to be added thereto". And nearly three more centuries of border strife and gradual amalgamation were to elapse before the Welsh lost even those remnants of Keltic law.

Its final extinction was the work of the Tudor dynasty. In 1535 the statute of 26 Henry VIII, chapter 25, uniting Wales completely to England, declared that "in order to extirp all and singular the sinister usages and customs of

## *15. End of Irish Law*

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Wales", hereafter "the laws, ordinances, and customs of this realm of England, forever, and none other laws, ordinances ne statutes, shall be had, used, practised, and executed in the said country or dominion of Wales and every part thereof."

15. The same century, the 1500's, that witnessed the formal extinction of the Keltic legal system in Wales saw the like struggle drawing to a close in Ireland.

Under Henry II and John, some Norman-English law had been brought over to Ireland by the invaders. Henry III, in A. D. 1221, commissioning his first judges for Ireland, thus referred to that earlier event: "Our father, John, took with him to Ireland discreet men skilled in the law, and ordained that the laws of England should be observed in Ireland". But this was not yet to be, except in the limited area (the Pale) on the east coast, occupied by the English royal deputies.

Under Henry VIII and Elizabeth the physical conquest and colonization of Ireland proceeded apace. But its law remained, in name at least, till the next century. Finally, in 1613, James I called an Irish parliament, and this body went through the form of declaring the Brehon law abolished. English law was substituted, and an English

## *X. Keltic Legal System*

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X. 30—THE FOUR COURTS, DUBLIN

court-house was later built—the Four Courts—in Dublin.<sup>30</sup>

Why did the Irish Keltic system thus perish? For two main reasons.

The first reason was external. The English conquerors of those days did not, would not, and could not preserve the native system, as the modern English could do and did do in India and elsewhere, and as the modern French have done in Islamic regions.

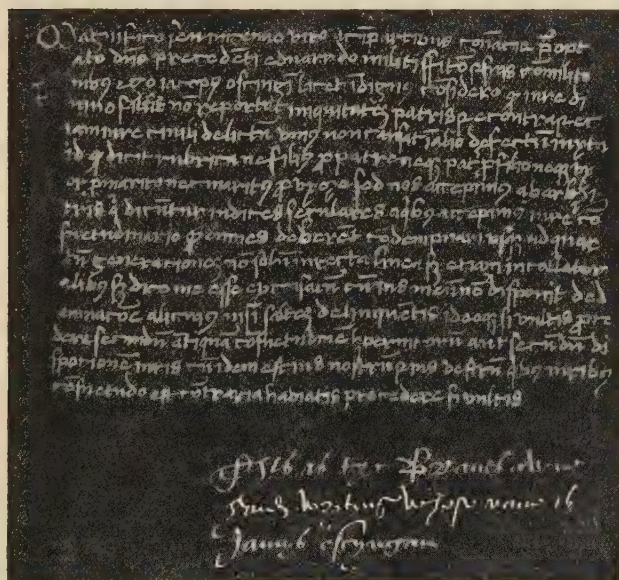
The second reason was internal. The Irish system was utterly behind the times, and had not been changed and adapted to suit the new times.



## 15. End of Irish Law

This task of adapting the law might have been achieved by either of two forces. It might have been done by the Brehons, the professional jurists, as the English judges and jurists were doing it for the common law, and as the Roman praetors had done it for Roman law. But the last known Brehon opinion is dated A. D. 1571, and it is even composed in Latin, not in Irish.<sup>31</sup> The Brehons failed in their destiny; just why, is matter for speculation. Together with the bards, to be sure, they were the constant voice of Irish patriotic tradition, and many of the

fraternity were exterminated in the course of the fierce wars of conquest. But their juristic results are in striking contrast with those of the Jew-



X. 31—THE LAST BREHON OPINION



## *X. Keltic Legal System*

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ish rabbi (*ante*, Chap. III), who amid similar circumstances of war and political defeat brought their customary law to its highest stage of development.

Or, secondly, the Brehon law might have been adapted to the new needs by a strong central executive, as was being done in Germany at that very period. But it was at this era Ireland's misfortune that it was denied (in Sir Henry Maine's words) "the great condition of modern legal ideas—a strong central government". For ten centuries (save a few brief moments about A. D. 1000, when Brian Boru saved Ireland from the Norsemen) there had been no effective chief king in Ireland. In the ninth century, for example, there were more than one hundred princes or chieftains,—all calling themselves "kings", each holding his own assembly and ruling his petty state, and from time to time one of them gaining a brief suzerainty over some of the others and then losing it again. This was in strong contrast with Keltic Scotland's history, where from the 500's onward there was but one kingdom of the Scots, and this one kingdom gradually dominated the whole country.

The last king who sat at Tara was Dermot, about A. D. 550, and his downfall was characteristic of the Keltic weakness. Dermot had been striving to give unity to the Keltic tribes, and to establish the stern justice of an



X. 32—THE CURSING OF TARA



## 15. *End of Irish Law*

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orderly state. In this effort he had sought firmly to punish a certain influential murderer, had pursued him to one of the churches where he had taken sanctuary, haled him forth, tried him at Tara, and condemned him. But Bishop Ruadan, offended at this defiance of the church's sanctuary rights, had resolved to break the power of King Dermot forever. He assembled the clergy, proceeded to Tara, excommunicated Dermot, and there pronounced a solemn curse upon Tara,<sup>32</sup> upon the king and his kingdom. "Desolate be Tara, forever and ever!" was his curse; and it fell upon the Keltic mind with all the terrible force which the Druid curse had carried. King Dermot yielded to the bishop, and gave back the murderer.

Ireland never again knew a unified kingly executive of its own. The curse remained on Tara. "The last feast of Tara", says the chronicle, "was made by Dermot".<sup>k</sup> The annual national festival of all the clans, which had for five centuries been celebrated in the mighty banquet hall, amidst the sonorous recitals of the bards,<sup>33</sup> was held no

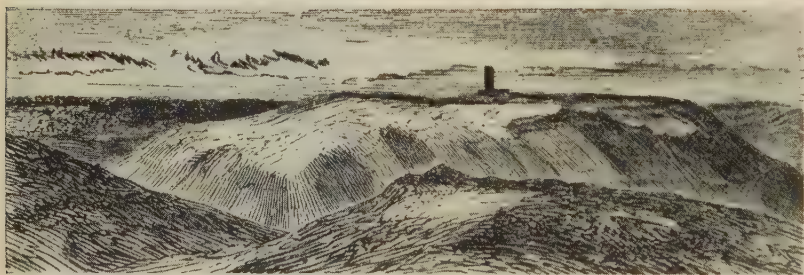


X. 33—THE HARP OF TARA

## *X. Keltic Legal System*

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more. "The Harp that once through Tara's halls The soul of music shed Now hung as mute on Tara's walls As if that soul had fled. So sleeps the pride of former days. So glory's thrill is o'er". The annual assembly of chieftains, which had listened in the forum of Tara to the Brehons pronouncing their judgments, and which might have developed into a genuine parliament, now ceased to meet. In the ensuing centuries, the repeated invasions of the Danes and the Normans effectually prevented any resurrection of Ireland's incipient unity. Tara, in the days of Henry VIII, when Brehon law might have made a sturdy stand for its life, had long been a desolate ruin, where scarcely one stone stood upon another.<sup>34</sup>



X. 34—THE RUINS OF TARA

16. But all the sentiment of the Irish people for its ancient political and legal glories still clustered round this spot. And it was indeed once more, momentarily, to



## 16. O'Connell and Tara

become a national meeting-place. This was in 1843. The English conquest had given Ireland a nominally national parliament, which with a shadow of legal independence had continued until 1799; in that year it had voted to extinguish itself, and to make a union with the English parliament. But in 1840 Daniel O'Connell,<sup>35</sup> the greatest Keltic political orator and leader since Vercingetorix, organized a movement for the repeal of this legislative union. And it was at the ancient hill of Tara that O'Connell, as a part of his propaganda, called a great

mass-meeting of Irishmen on August 15, 1843. It was reported by the *London Times* that one million persons thronged to this monster assembly; most of them must have trudged on foot from every corner of the land; it was probably the largest single political meeting in the world's history.<sup>1</sup> But it was the last strong throb of Ireland's political heart. The repeal movement



X. 35—O'CONNELL'S STATUE  
AT DUBLIN

*X. Keltic Legal System*

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X. 36—DANIEL O'CONNELL

This rare portrait gives an idea of the physical power  
which fortified his eloquence

failed. Daniel O'Connell passed away,<sup>36</sup> and the Irish

## SAORSTÁT EIREANN.

*Uimhir 10 de 1924.*

### ACHT CUIRTEANNA BREITHIUNAIS, 1924.

*[An leagan Gaeilge do hullamhúidh go hoifigiúil.]*

ACHT CHUN CUIRTEANNA BREITHIUNAIS DO BHUNU  
DO REIR BUNREACT SHAORSTAIT EIREANN  
AGUS CHUN CRICHEANNA A BHAINÉAS LE  
FEABHASU RIARA CIRT. [12adh Abrán. 1924.]

DE BHRI go bhfuil sé riachtanach chun comhacht  
bhreithiúnais Shaorstáit Eireann d'fheidhmiú agus chun ceart  
do riara i Saorstát Eireann, cúirteanna puiblí do bhunú do  
réir na bhforálacha atá sa Bhunreacht chuige sin:

ACHTUIGHEADH OIREACHTAS SHAORSTAIT EIREANN  
AR AN ABHAR SAN MAR LEANAS:—

#### ROIMH-FHOCAL.

1.—Féadfar chun gach críche an tAcht Cúirteanna Breithiúnais,  
1924, do ghairm den Acht so.

X. 37—THE IRISH ACT OF APRIL 12, 1924

This is the first page of the Act. The words at the top mean "Irish Free State"

did not regain their legal independence for another eighty years.

17. A modern Keltic author, commenting on racial

## *X. Keltic Legal System*

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X. 38—THE CHIEF JUSTICE,  
HUGH KENNEDY

traits, has spoken of "the Keltic luxury of scheming against the inevitable". The Irish continued to indulge in this luxury. And the dream did come true at last.

The Supreme Court of Judicature of the Irish Free State was established by the Irish Act of April 12, 1924.<sup>87</sup> The first Chief Justice of the court was Hugh Kennedy.<sup>88</sup>

This court (to quote the inaugural speech of the Chief Justice) "will administer justice according to laws made in Ireland by free Irish citizens for the well-being of our dearly loved land and its people, enshrining the ancient inspiration and invoking again the dormant reverence for a judgment"; that is, in Irish, "breith". And on June 11, 1924, a solemn procession was seen marching through the streets of Dublin to the Castle to open the first session of the court.<sup>89</sup>

The name of the court in the Act is "Ard-Chuirt" or Chief Court; the word used for "judgment" in the act is

## 17. Ireland's Iron Law Again

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X. 39—PROCESSION TO OPEN THE SUPREME COURT, 1924

“breith”, and the name for “judge” is “breitheamh” (pronounced “brehiv”), the old Keltic words exactly. In language, it is a Keltic court. But by a curious irony the very first writ issued from this court in the ancient Keltic language was an action for damage caused by negligent driving of a twentieth-century motor-car!

And, after all, the law which this court administers will never be the ancient Keltic Brehon law. Sure, that is gone forever,—Ta a chnaipe déanta anois sheachas ariam.



## X. Keltic Legal System

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### Sources of Illustrations

1. *Map of Europe Showing Literate Regions A. D. 50.* Prepared by the author.
2. *Vercingetorix Surrenders to Caesar.* From the illustration by *A. de Neuville*, in *F. P. G. Guizot*, "History of France", vol. I, p. 66 (Boston, Estes & Lauriat, 1882).
3. *Statue of Vercingetorix.* From a view by *E. Clerc-Darcy*, librairie photographe, Sémur, of the monumental statue by *J. B. Millet*, at Alise-Ste-Reine (the Roman Alesia).
4. *Map of Keltic Race Settlements.* Prepared by the author.
6. *Stonehenge.* From an old print reproduced in a pamphlet by *Moses Cotsworth*, on the calendars of all peoples.
7. *The Plain of Carnac.* From a photograph by *E. Hamonic*, Brittany.
8. *An Eisteddfod Assembly in Wales.* From a photograph furnished by *J. Ballinger*, Librarian of the National Library of Wales, 1926. A full-page photograph of an eisteddfodd assembly ("The Arch-Druid at the Gorsedd Stone") is shown in *H. V. Morton*, "In Search of Wales" (New York, 1932).
9. *A Druid Pronouncing Judgment.* From an illustration by *Wm. Rainey*, in *Mary McGregor*, "Story of France", p. 4 (Edinburgh, Nelson, New York, Stokes, 1920).
10. *Druids Offering a Human Sacrifice.* From the illustration by *A. de Neuville* in *Guizot*, "History of France", vol. I, p. 111 (Boston, Estes & Lauriat, 1882).
11. *Forum and Basilica at Silchester, A. D. 200.* From a drawing by *A. Forestier*, archaeologist, as reproduced in the "Illustrated London News", Sept. 19, 1925; representing the results of recent discoveries.
12. *A Keltic Fighter.* From the Roman sculpture reproduced in *O'Curry* (cited *infra*), I. cxcviii.
13. *Map Showing Tara.* From the map in *Lawless* (cited *infra*).
14. *Ground-Plan of Tara.* From the reconstruction by *George Petrie*, "History and Antiquities of Tara Hill" (Transactions of the Royal Irish Academy, 1839, vol. 18; as reproduced in *P. W. Joyce*, "Social History of Ancient Ireland", vol. II, p. 80, London, Longmans, 2d ed. 1913).

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- 15a. *The Wrong Judgments of Caratnia*. From the facsimile reproduction in "Rawlinson MS. B. 502", page 113, in the Bodleian Library, ed. *Kuno Meyer* (Clarendon Press, 1909).
16. *Pathric Causing the Irish Customs to be Written Down*. From the illustration in *T. W. Rolleston*, "Myths and Legends, the Celtic Race," p. 278 (London, Harrap, New York, Crowell, 1912).
17. *Statue of St. Pathric on Tara Hill*. From a photograph by *Ewing Galloway* (New York, 1926).
18. *St. Columba Winning the Kelts*. From the illustration in *Henrietta E. Marshall*, "Scotland's Story", p. 16 (London, Nelson, New York, Stokes, 1907).
20. *Irish and Saxon Law Script, Compared*. From facsimile pages in *Thorpe's* "Ancient Laws of England" and the *Senchus Mor* facsimile, *infra*.
21. *The Book of Aicill*. From the facsimile of Trinity College MS. Collection, E. 3, 5, as reproduced in "Ancient Laws, etc.," vol. III, frontispiece (cited *infra*).
22. *The Senchus Mor*. From the facsimile of the British Museum Harleian MS., No. 432, as reproduced in "Ancient Laws and Institutes of Ireland", vol. II, frontispiece, plate I (London and Dublin, published for the Government Commissioners, 1865), and the same passage, enlarged, in *Joyce*, I, 176 (cited *supra*).
23. *Welsh Laws of Howel the Good*. From a photograph of the original MS. (Peniarth MS. 32, Hengwrt MSS. 311 and 8) of page 1 of the Venedotian Code, in the National Library of Wales, Aberystwyth (furnished in 1926 by the Librarian, *J. Ballinger*, M. A.).
24. *The Judge and the King*. From the Peniarth MS. 28, Hengwrt MS. 7, as reproduced in *Aneurin Owen*, "Ancient Laws and Institutes of Wales", vol. II, pp. 751, 758 (London, 1841).
25. *Judge Lynch's House at Galway*. From the illustration in *M. M. Shoemaker*, "Wanderings in Ireland", p. 4 (New York, Putnam, 1908). A striking instance of a reverse contrast between English and clan ideas of justice may be seen in the anecdote of the Shammari's execution of his own son, in modern Arabia: *Fulanain*, "The Marsh Arab," p. 60 (Phila. 1928).

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26. *Statue of Llewellyn*. From a photograph of the original in Conway, procured for the author by W. F. Mansell (London, 1924).
27. *Owen Glendower's Parliament House*. From the illustration in George Borrow, "Wild Wales", p. 312 (New York, Putnam, 1900).
28. *Magna Carta, cap. 56*. From a lithograph facsimile of one of the MS. (Washington, D. C., M. Walker Dunne, n. d.).
29. *Rhuddlan Castle*. From the illustration in O. M. Edwards, "Story of Wales", p. 197 (New York, Putnam, 1901).
30. *The Four Courts, Dublin*. From the illustration in Emily Lawless, "Story of Ireland", p. 369, drawn by R. Harvey, engraved by M. A. Williams (New York, Putnam, 1891).
31. *The Last Brehon Opinion*. From the facsimile in Sir J. T. Gilbert, "Facsimiles of National MSS. of Ireland", part IV, div. 1, plate XVI (London, H. M. Stationery Office, 1882).
32. *The Cursing of Tara*. From the illustration in Rolleston, p. 48 (cited *supra*).
33. *The Harp of Tara*. From the drawing by Robert Hope in Thomas Nelson & Sons' edition of Sir Walter Scott's "The Betrothed", p. 16 (Edinburgh, 1901).
34. *The Ruins of Tara*. From the illustration by W. F. Wakeman, in Mr. & Mrs. S. C. Hall, "Ireland, Its Scenery and Character", vol. II, p. 386 (New York reprint, Lovering, n. d.).
35. *Daniel O'Connell*. From a lithograph (undated), drawn by Edouard D'Arsey and printed by d'Aubert, from a daguerrotype by Poussin-Dubreuil, at Dublin.
36. *O'Connell's Statue at Dublin*. From a photograph in Charles Johnston, "Ireland Historic and Picturesque", p. 372 (Philadelphia, Coates, 1900).
37. *Irish Act of April 12, 1924*. From a copy furnished in 1925 to the author by the late Hon. Kevin O'Higgins, Minister for Justice (assassinated in 1927).
38. *Chief Justice Kennedy*. From a photograph furnished by Hon. Kevin O'Higgins.
39. *Procession to the Court, 1924*. From the only photograph taken, furnished by Hon. Kevin O'Higgins.

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- a. Caesar's Commentaries on the Gallic War, book VI, par. 13.
- aa. This anecdote of Grattan is vouched in *D. A. Chart's* "Story of Dublin" (Medieval Towns Series, 1907), p. 173. More striking examples are chronicled by Sir *Jonah Barrington*, judge of the Irish High Court of Admiralty, in his "Personal Sketches of his Own Times" (1827), vol. II, p. 3, on duelling: "It is in fact incredible what a passion the Irish gentlemen (though in general excellent-tempered fellows) formerly had for fighting each other and *immediately making friends again*"; see also *ibid.* vol. III, p. 230 (Donnybrook Fair).
- b. Finn v. Goll. Told in *J. Stephens*, "Irish Fairy Tales", p. 166 (1920). The case was adjudged presumably on the same principle that still obtains for inter-clan killings with some Arab tribes; the side whose losses exceed the other's is the one to receive compensation for the excess loss: *Fulanain*, "The Marsh Arab", p. 70 (Phila. 1928).  
The general spirit of Keltic tribal days, as here portrayed, in paragraphs 6 and 7, can be largely re-constructed by a study of modern Bedouin life in Arabia. See the anecdotes in *Kennett's* "Bedouin Justice" (cited *ante*, Chap. IX, p. 646), and the following: *Alois Musil*, "In the Arabian Desert" New York, 1930, ed. K. G. McWright; Chap. II, p. 21 (two chiefs of rival tribes, who "as chiefs are enemies, but as men were the best of friends. . . I love M. as I love my sons"); Chap. III, 52, Chap. VI, p. 148 (raiders; "we honor J. because he was a pet of Allah; he undertook countless raids, and returned from them all unhurt and with much booty"); Chap. XI, p. 299 ("The Bedouins consider fighting as a sport"). *Carl R. Raswan*, "Black Tents of Arabia" (Boston, 1935; Ch. XXII, p. 115; "Amir Fuaz gave me a personal letter to Hajein Pasha. . . . Fuaz was closely related to Hajein Pasha, though these ties did not prevent the two chiefs from indulging in mutual pillage and warfare as opportunity offered").
- c. St. Columba's Defence. As quoted in *O'Clery*, "Annals of the Four Masters", ed. O'Donovan, vol. I, p. 192, A. D. 555 (Dublin, 7 vols. 1851). Citations of sources for King Cormac's judgments can be found in Chap. VI of *Macalister's* "Tara" (cited *infra*, note *k*).
- d. Judgments of Caratnia. Translated from the German translation of Professor *R. Thurneysen*, Bonn University, in his edition, with glosses, of the text, "Aus dem Irischen Recht: III, Die falschen Urteils-sprüche Caratnias" (*Zeitschrift für celtische Philologie*, 1925, XV, 302); the translation

## X. *Keltic Legal System*

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has had to be somewhat expanded from the elliptical original, in order to make clear the distinctions intended.

No graphic representation of a Brehon costume appears ever to have been transmitted; none could be discovered for the author by the following learned bibliologists: Eleanor Lewis, Reference Librarian in Northwestern University; Walter M. Smith, Librarian of the University of Wisconsin (Irish Collection); the Librarian of Trinity College, Dublin; G. Fitzgerald, Assistant Librarian of the Royal Irish Academy, Dublin; L. S. Gogan, Assistant Keeper of Irish Antiquities, National Museum, Dublin; to the last of whom special thanks are due for his exhaustive search.

- e. This is the view plausibly advanced by *Bertrand*, "La religion des Gaulois: les Druides et le Druidisme" (1897), though it has not been met with in other authors. It is certainly the one fact which adequately explains the sudden appearance in writing of a full-fledged system of Keltic law about A. D. 500-800,—a phenomenon otherwise unparalleled and incomprehensible.—Since noting the above, the author finds that substantially the same view is taken by Professor *John MacNeill*, the eminent Irish historian ("Celtic Ireland", 1921, p. 24), who is striving to define the solid territory of historic fact hitherto obscured by the golden magic mist of Irish legend. It is interesting to note that this view was already advanced nearly a century ago by the eminent Breton historian, *Aurélian De Coursan* ("Histoire des Origines et des Institutions des Peuples de la Gaule Armorica et de la Bretagne Insulaire", etc.; 1843, Saint Brieuc, Prudhomme); Chap. IV, p. 60, Les Druides au temps de la conquête: "L'église ... respecta des usages anciens... Les évêques de la Gaule, ces druides chrétiens, héritèrent de toute la puissance de leurs prédécesseurs." See also the recent comments of *Evan J. Jones*, "History of Education in Wales" (1930, Vol. I, Appendix 2, Druidism in Ireland). Another modern Keltic scholar goes even farther and maintains the continuity of the Druidic priesthood from megalithic pre-Keltic times: "The Druids were the priests of the pre-Celtic (megalithic) aborigines of the British islands, and it is from them only that the Celts received them" (*Julius Pokorny*, in the *Celtic Review*, V, 17, July 15, 1908, and the Report of the Smithsonian Institution for 1910, p. 583).
- f. Passage from the *Senchus Mor*, in "Ancient Laws and Institutes of Ireland", vol. I, p. 256.
- g. Passage from the Book of *Aicill*, *ibid.*, vol. III, p. 243.
- h. Passage from the Laws of *Howel the Good*, in "Ancient Laws and Institutes of Wales", vol. II, p. 648, ed. *Owen* (London, 2 vols. 1841).



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- i. Brehon Custom of Compounding a Homicide. From *Edmund Spenser*, "A View of the Present State of Ireland" (Complete Works, Grosart ed., vol. IX, p. 122, London, 1882). To understand this belief in the compounding of a homicide by the tribe or family, with endless vendetta as the only alternative, one may read examples showing its living force to-day in Arabia: *Bertram Thomas*, "Arabia Felix", 1932, pp. 82-90, 274-276; and the instances cited *ante*, Chap. IX, notes on the justice of Ibn Saud.
- j. Magna Carta, cap. 56. From the text in *Wm. S. McKechnie*, "Magna Carta" (Glasgow, 2d ed. 1914).
- k. Cursing of Tara. It must be added that the story of Tara's cursing and forthright desolation, which most modern writers on Irish history have accepted for fact, is now disbelieved by Professor MacNeill, who gives plausible reasons ("Phases of Irish History", 1920, p. 234). And yet, even as a long accepted legend, it seems to symbolize correctly enough some features of history. The story of the Cursing of Tara is in general accepted by a modern scholar who is president of the Royal Irish Academy and professor of Celtic Archaeology at University College: *R. A. S. Macalister*, "Tara: A Pagan Sanctuary of Ancient Ireland" (New York, 1931). Dermot's effort to enforce obedience to kingly law is told in the same spirit as the text above by *Padraic Colum*, "Crossroads in Ireland" (New York, 1930, p. 24): Dermot replied to the Ruadan: "It is a good work that I am engaged on, striving to uphold order and justice, to maintain right, and enforce respect for law. And I had the certainty of attaining it, were only peace maintained. But as for you, ill is your work in attempting to uphold wickedness, overturning right and sovereign rule, bringing law into contempt and protecting criminals".
- l. As to the mass-meeting at Tara, the estimate of attendance given in the "State Trials, New Series", Vol. V, p. 16 (O'Connell's Trial) is 800,000. The "Times" estimate of 1,000,000 is cited in *Denis Gwynn*, "Daniel O'Connell, the Liberator" (1930), p. 259.

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THE  
SLAVIC  
LEGAL SYSTEM





## XI

### *The Slavic Legal System*

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XI. 1—MAP OF SLAVIC REGIONS

## XI

# The Slavic Legal System



THE Slavic race has contributed to the world's human nature some of the most admirable and distinctive traits,—especially an unquenchable idealism. But no native, pure, and distinctive Slavic legal system ever came to pass. This was due partly to the racial tendency to egocentric unpractical dissension over ideals, which left the Slav people politically weak; partly to the invasions of other forceful races; and partly to the close proximity of more advanced legal systems.

The settlements of the Slavic race covered nearly two-thirds of Europe;<sup>1</sup> their westernmost edge ran originally on a line drawn south somewhere between the modern Berlin and Venice. But, of the twelve or fifteen Slavic race-branches, almost all have been overlaid or penetrated and diluted by alien peoples coming from the north, the west, and the south.

The four principal Slav branches that stand out most individually and compactly in legal history are the Bohemian, the Polish, the Serbian, and the Russian; and we shall sketch their legal history in this sequence.

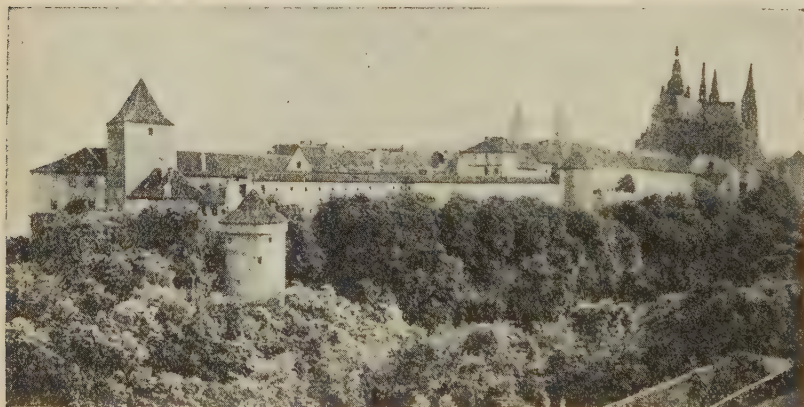
## *XI. Slavic Legal System*

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### (I) BOHEMIA

2. The original home of the Slavic race seems to have been in the dreary marsh-lands of Galicia. But the Bohemians and the Poles wandered thence west and north, while the Russ and the Serbs spread east and south.

Now, although no written code of purely Slavic legal ideas exists, or probably ever did exist, nevertheless, the earliest recorded legend of the Slavic people is the story of a lawsuit, in the Check tribe in Bohemia, upon their settlement at Prag. A medieval sketch shows the early castle of St. Vaclav at Praha (in German, Prag); on the right stands Chech, leader of the earliest Bohemian settlement, whose name the people now bear; on the left is Lech, his cousin, leader of the immigrant Poles, who



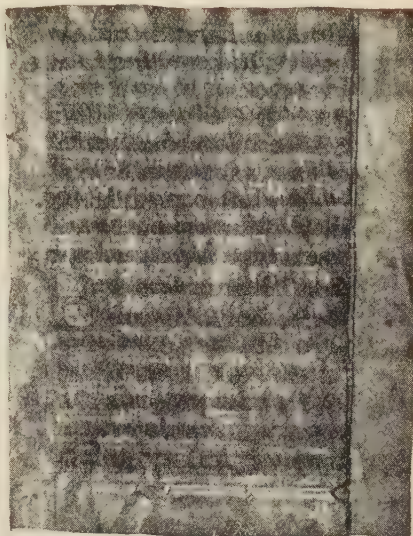
XI. 2—HRADCHANY CASTLE, IN PRAHA



## (Bohemia) 2. *The Early Checks*

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wandered further north. About A. D. 600 the original castle was built; but on its very site today stands the superb Hradchany Castle.<sup>2</sup> This castle, enormous in area, and commanding in its position, has through the centuries been the central scene of Bohemian political and legal history. The early Slav legend of a lawsuit is located on this spot; the event is called The Judgment of Libussa. The medieval manuscript chronicling this legend in verse came to light only in the late 1800's, and is now preserved in the National Bohemian Museum at Praha.<sup>3</sup>



XI. 3—THE JUDGMENT OF LIBUSSA (MS.)

Libussa was a virgin leader of the Checks. They then had no king, but lived in free tribal democracy, like the Greeks, each family holding its property in common. Their only common government was an elected judge, and at this period the judge was a woman,—the beautiful maiden Libussa. It came to pass that two brothers in the

## *XI. Slavic Legal System*

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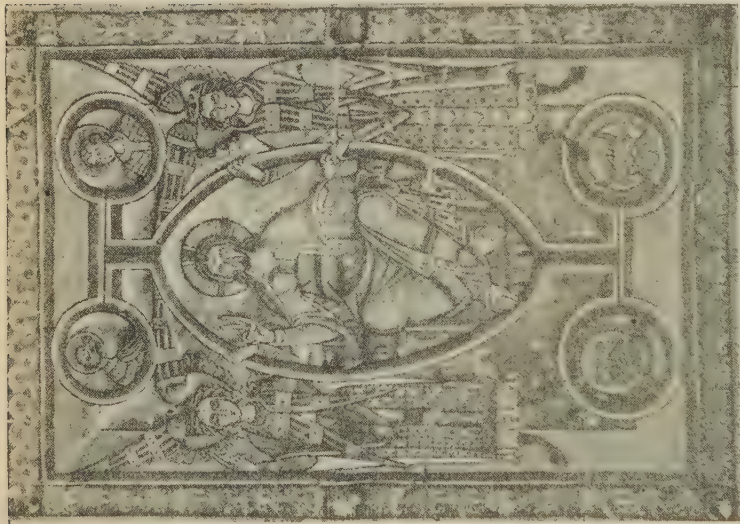
community, on their father's death, quarreled over the inheritance. Libussa summoned them before her as judge, and in the presence of the assembled people she pronounced that the two brothers should divide the property equally; for this had been the custom.<sup>4</sup> Yet she then left it to the assembly to approve or disapprove her judgment. Whereupon the elder of the brothers (says the chronicler), rose boiling and trembling with rage, shook his fist, and roared like a bull:<sup>a</sup> "It is a cursed judgment. The inheritance should go to the older son—to me, and not be equally divided. We have had enough of a woman judge. And I call upon you to depose this woman, and let men be ruled by a man." On which Libussa replied: "You hear his insult. I will no longer judge over you. Choose now a man, for king, who will rule you with a rod of iron." And so they installed a king.

The story is significant for us, because it illustrates the first great reason which has ever since hampered the political and legal development of the Slavic race,—its restive tendency to disunion and secession, except when ruled by a despot.

3. The second element obstructing native Slav development has been the intrusions of an alien race and law,—in this case, Germanic. Brünn was one of the chief mercantile towns in this region, and German merchants

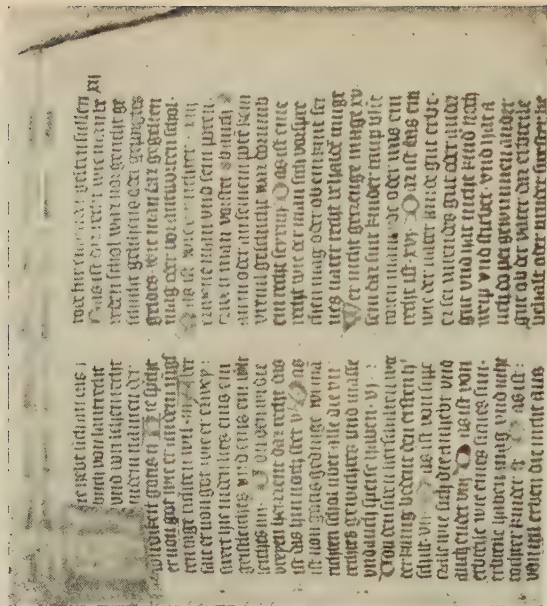


XI. 4—THE JUDGMENT OF LIBUSSA



# XI. 6—BRÜNN BOOK OF RIGHTS, A. D. 1243

This was the book of Germanic law for the Germanic merchants who populated the town of Brünn.  
It begins, in old German: "Hie hebt sich an das 1 buch von lantrecht und von lehenrecht  
in dem namen der wirdikeit gottes"





### (Bohemia) 3. Germanic Element

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dominated it.<sup>5</sup> All the chief towns of Bohemia were composed mainly of Germanic immigrants,—merchants, who lived by Germanic law, usually that of Magdeburg in Saxony; and the town laws of these semi-Germanic cities became a chief source of mercantile law.

The Brunn Book of Rights, of A. D. 1243,<sup>6</sup> was the most notable of these town codes. The manuscript still preserved at Brunn is one of the finest among medieval law-books. The law itself is crude enough; in §9, for example, it is provided that he who cannot pay damages for a mayhem must suffer “an eye for an eye, a hand for a hand, and so on for other members of the body”.<sup>b</sup>

The court records of Bohemia are more abundant than in any other Slavic country; but at this time, and for three centuries later, they are meagre and crude,—in marked contrast to the English year-books of the same period. Here is one from Brunn; though as late as 1495, it contains merely a minute of the plaintiff's claim, and some-



XI. 5—TOWN HALL AT BRÜNN

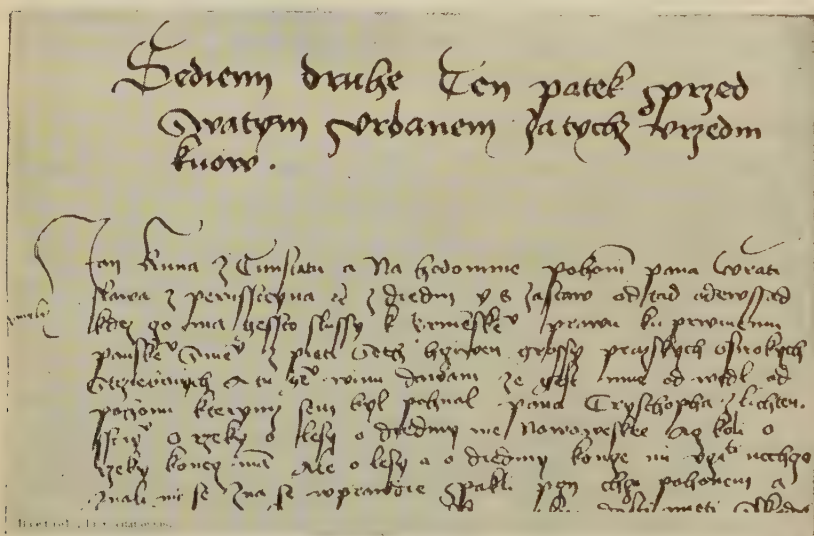


## XI. Slavic Legal System

times a brief judgment, but no opinion nor argument nor citation of authorities.<sup>7</sup> It reads:<sup>c</sup>

"Second Session, Friday before St. Urban's Day. I John Kuna of Kunstat and Hodonin make claim against Mr. Vratislav of Pernstein, free-holder, for 500 marks of broad silver groschen, coinage of Prag, and do allege that he had obstructed me in the suit which I brought against Mr. Kristofer of Lichtenstein for certain river, forest, and homestead land at Nove Ves; for though he has settled with me for the river land, he refuses to settle for the forest and homestead land. If he admits my claim, I ask judgment. If he disputes it, I will prove the contract and damages.

"Power of attorney given to my brother, Mr. Bocka, for winning or losing the suit". [Memo. of Clerk] "Deft. died".



XI. 7—COURT RECORD AT BRÜNN, A. D. 1495  
The heading reads: "Sednem druhe ten patek przed Svatym  
Urbanem za tychz urzednikov"

## (Bohemia) 4. Roman Law

4. Bohemia in this period produced a number of native law-treatises of the type of our English Littleton; and these writers, in the 1400's, might have developed an enduring Slavic type of law. Meantime, however, was operating still a third alien influence,—the resurrected Roman law from Italy. In A. D. 1300 was in vogue the elaborate code of the mining region at Kutnahora, the *Jus Regale Montanorum*, in several hundred sections.<sup>8</sup> A doctor of the civil and canon law had been imported from Italy to draft this code. It is written in Latin (not in Slavic), and is divided into books, entitled Persons, Things, Actions, like the Roman Gaius; and in the very



XI. 8—THE *JUS REGALE MONTANORUM*

## *XI. Slavic Legal System*

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opening paragraph we detect the celebrated passage, copied from the first chapter of Justinian's Digest, enjoining the people "honeste vivere, alterum non laedere, jus suum unicuique tribuere".

Meantime, in this same century, comes on the scene Charles IV, Emperor of Germany and King of Bohemia, and one of Bohemia's great national heroes. He set himself to weld together these conflicting elements,—the native Slavs, the mercantile Germans, the Romanesque law learning, and the religious factions. He made Prag

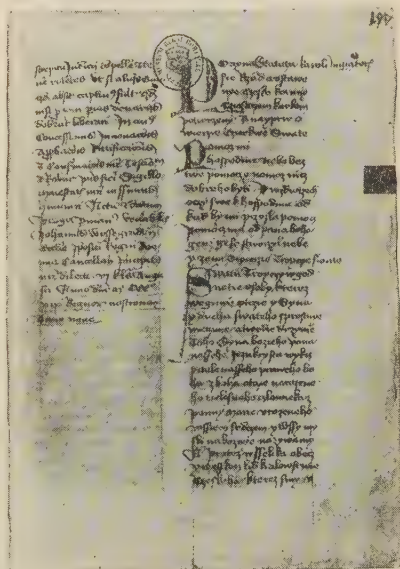


XI. 9—CHARLES IV FOUNDING THE UNIVERSITY OF PRAG

## (Bohemia) 4. Roman Law

for centuries the intellectual centre of the Germanic countries. He founded the University of Prag, in A. D. 1348,<sup>9</sup> the first university in any German or Slavic region, and there he instituted the teaching of Roman and canon law. His ambition was to become the great law-giver for Bohemia. And he imported the celebrated Bartolus, Italy's most famous jurist of the day (*post*, Chap. XV) to help draft a complete national code.

This code, known as the *Majestas Carolina*, in one hundred and eight sections, was duly promulgated, A. D. 1346.<sup>10</sup> But the Bohemian nobles in Parliament, with the fatal Slav tendency to disunion, refused to ratify it; for it diminished their power and improved the condition of their peasants. And so, nine years later, Charles was forced to recant and to declare his code null and void; oddly enough, he sought to cover his chagrin by the false recital in his decree that the only copy of the code had been



XI. 10—THE CODE OF CHARLES IV,  
MAJESTAS CAROLINA



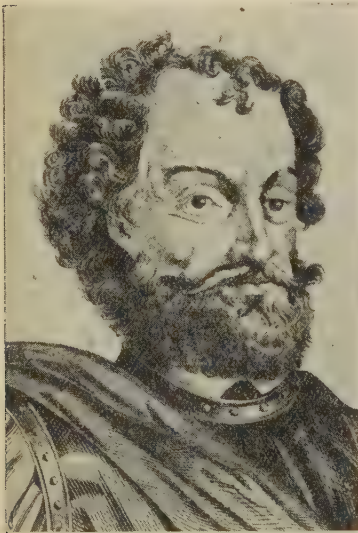
## *XI. Slavic Legal System*

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destroyed by fire before it reached the Parliament.

5. The efforts of the great Charles to weld together the conflicting elements, Germanic and Slavic, failed utterly; and for three centuries more Bohemia continued to be convulsed by the conflict, religious and racial, Catholic and Protestant, Germanic and Slav, typified in the Protestant rebellion of John Hus.

This conflict came to an end with the execution of the Check patriot and orator, Budovec, chief justice of the



XI. 11—BUDOVEC, CHIEF JUSTICE  
OF BOHEMIA

He was executed in the market-  
place, A. D. 1621

Supreme Court.<sup>11</sup> Budovec had headed a movement against the German faction under Slavata, who was a rival chief justice by appointment of the German Emperor Ferdinand I at Vienna. The Check leaders, at a solemn final meeting with the German faction, in the Council Room of the Hradchany Castle, on March 3, 1618, ended by casting out of the windows bodily the rival chief justice Slavata and his associates; this being



## (Bohemia) 5. Germanization

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XI. 12—THE MARKET-PLACE AT PRAG

Here the Bohemian patriots were  
executed, A. D. 1621

the traditional form of punishment for traitors in Bohemia. This act of “defenestration”, as it is called, stands out in Bohemian patriotic history as Bunker Hill does in American history. But the issue was far otherwise. For three years later, at the Battle of the White Hill, near Prag, the Emperor Ferdinand totally defeated the Bohemian forces. Budovec and a score of Check

leaders were executed in the market-place of Prag before the old town hall, on June 21, 1621.<sup>12</sup> It was a popular saying that “the last Bohemian fell at the battle of the White Hill”. More than half the population was now exiled; three-quarters of the landed estates were confiscated. After 1621, Bohemia’s independent political existence ceased. Under the Hapsburg dynasty the Check legal system was gradually and completely Germanized.

## *XI. Slavic Legal System*

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Czechoslovakia is now once more politically independent, and has re-cast its legal codes. But its legal system is not and never can be distinctively Slavic.

### (II) POLAND

6. It is an odd coincidence that in all four principal Slavic branches, in spite of their very different histories, the century of the 1300's was the first period of national law-giving. Charles IV in Bohemia in A. D. 1346 had promulgated his *Majestas Carolina*; and in A. D. 1347 Kasimir III of Poland, called Kasimir the Great,<sup>13</sup> promul-

gated his *Charter of Wislica*, to unite the new extensive domains of his crown and to give them a single common law.



XI. 13—KASIMIR THE GREAT

Kasimir was Poland's first great law-giver, and this *Charter of Wislica* the Poles regard as the finest monument of their native law.<sup>14</sup> And yet it was not pure Slavic law. Kasimir in A. D. 1364 had founded the University of Krakow

(Poland) 6. *Alien Elements*

on the models of Bologna and Paris; had dreamed of propagating the study of the new Roman legal science; and had imported French and Italian jurists to help draft his code. The Romanesque law was already filtering in, and the Roman Church with its ecclesiastical law was powerful. Latin, not Polish, was the language of the statutes and the court records. A record,<sup>15</sup> in Latin, from the Court of Krakow, A. D. 1400, reads:<sup>d</sup>



XI. 14—KASIMIR BESTOWING THE  
CHARTER OF WISLICA

“General Session held at Krakow, May 10, 1400. Note that Pelca of Bydlin has bound himself to pay fifty marks of Prag money on Christmas next, with Dobcon of Paulow as surety; if he does not pay, then all of his estate at Bydlin is security for the said default.

“Helen, widow of Nicholas of Wojcechovice, brings suit for an affair against Master Dobcon”.

Thus we find the same meagreness as in the Bohemian records,—a mere minute of the claim; no opinions, reasons, or citations,—in striking contrast to the English year-books of the same period.

Colloquium generale  
 et celebratum Gruvine  
 feria secunda proxima post die  
 m Sati Stanislai tempore mensis maii  
 Anno domini millesimo cccc.

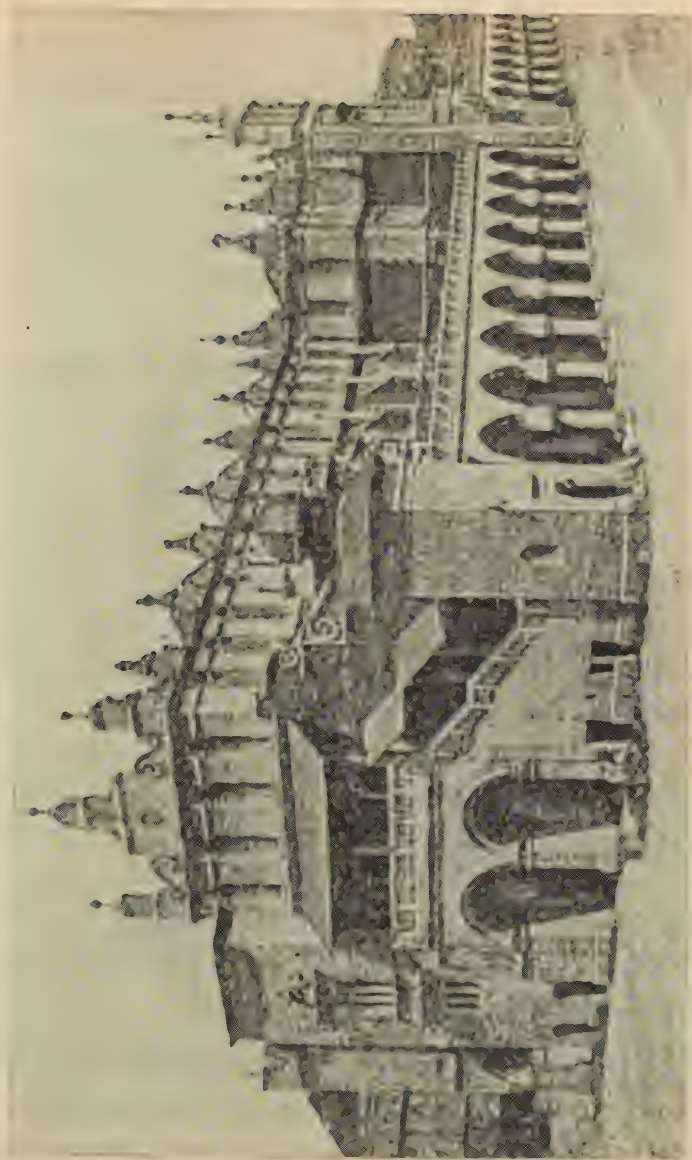
no pcha & bydlin dca nunc gyp pra  
 gen nulla quoniam enarando ad  
 festum nunc p p rone fide  
 nysse camp. dalcioni d p mbo  
 oblit p plunus (si no plunus tuc  
 sibi toram pory hie fub in byd  
 lin nunc p pory obligare te  
 nebr subdupm amplyz camp

pou  
 Helena nola nunc d boi rethone  
 causa quoniam enarando Gruvine &  
 ibus q dnm dalcioni oblit  
 dca nunc

XI. 15—COURT RECORD OF KRAKOW, A. D. 1400

The term for "general session" here is "colloquium generale" (line 1),  
 the entry begins: "Colloquium generale celebratum Gruvine feria  
 secunda proxima post diem Svati Stanislai tempore mensae  
 maii anno domini millesimo cccc."





XI. 16—CLOTH MERCHANTS' HALL AT KRAKOW



## *XI. Slavic Legal System*

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But, besides the Roman law, the influence of Germanic law was also strong; for German merchants had settled in all the large towns; their own mercantile courts were held in their great guild halls, like the one at Krakow,<sup>16</sup> and appeals were taken to Magdeburg in Germany, the headquarters of Saxon mercantile law.

7. Meanwhile, the Polish nobles had become restive. Under the indolent Kasimir IV, of the Jagiello dynasty, the fatal Slav tendency to dissension began to undermine Poland's future. In A. D. 1454, Kasimir IV then being king, the nobles wrested from him a charter of privileges, the Constitution of Nieszawa,<sup>17</sup> which formed the first national constitution, and virtually placed the government in the hands of a parliamentary oligarchy. This statute has been called the Magna Carta of Poland. But in England the weak King John, who yielded to the barons, was soon replaced by the mighty Edward, who proved himself their master; while in Poland the trend was exactly the opposite. Forty years later the Polish nobles fixed by law the status of their peasants as serfs; and the nobles' privilege to hold their own baronial courts independent of the king was confirmed.

The climax came in 1505, at the Parliament of Radom, where the nobles established the political principle that was to seal Poland's future doom,—the "Liberum Veto".



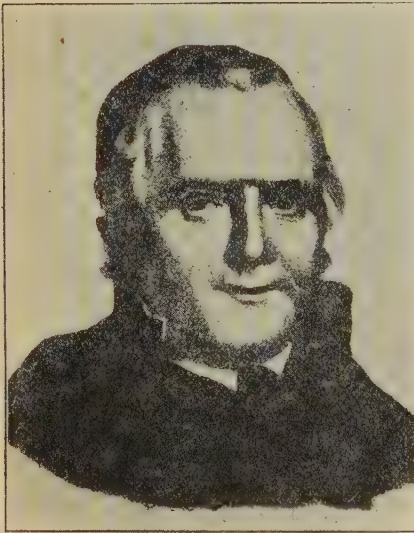
XI. 17—CONSTITUTION OF NIESZAWA, A. D. 1454

## *XI. Slavic Legal System*

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The exact words were:<sup>c</sup> “*nihil novi constitui debet . . . . . sine communi consiliorum et nuntiorum terrestrium consensu*”. This is the rule that all parliamentary action must be by unanimous vote; a single negative vote meant no new law. Even on appeal from the courts, a single veto in the Senate could annul the decree. This was the Slavic spirit of egocentric secession and dissension apotheosized. It prevented Poland from ever developing a strong unified political and legal system.

Many able jurists indeed arose, notably Stanislaw Konarski, in the 1700's,<sup>18</sup> a priest, who strove single-

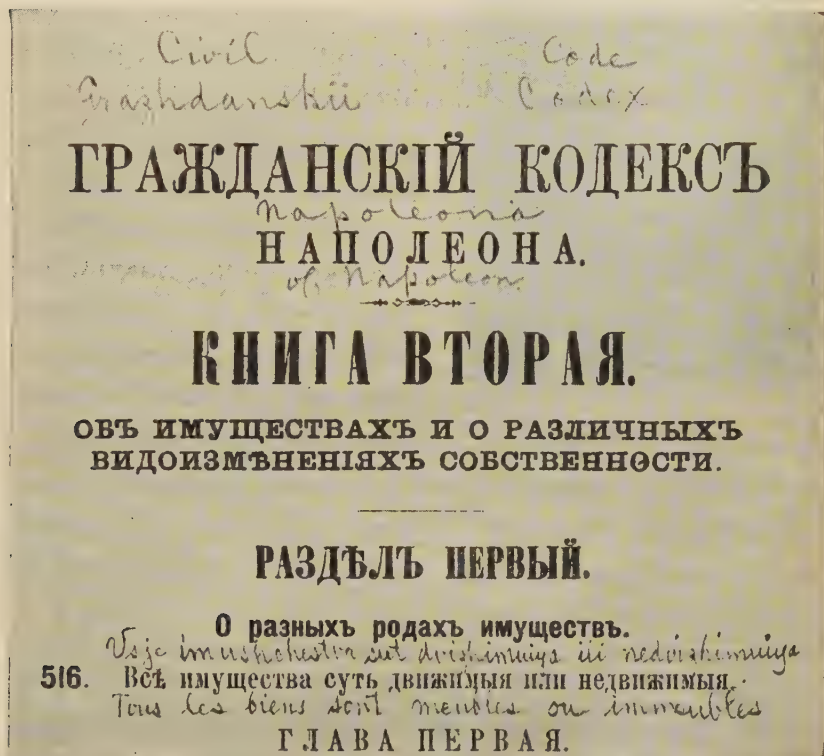


XI. 18—KONARSKI THE JURIST

handed and unofficially to harmonize and codify all Poland's heterogeneous laws. But no genuine legal profession had ever arisen in Poland. And the constant political dissensions made all legislative efforts futile. For example, during the entire thirty years of Augustus III's reign, in the 1700's, there was

only one Parliament that had not broken up in disorder.

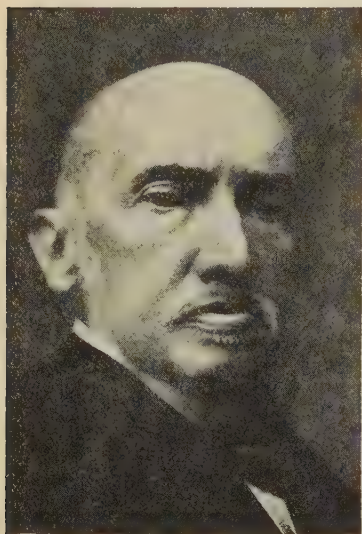
8. The end is known to all. Poland was cut up and apportioned to the neighboring powers. During Napoleon's brief control, in 1808, the Code Napoleon was put into force, superseding the ancient laws.<sup>19</sup> How greatly



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Romanized the Polish law had already become may be inferred from the fact that in the 1700's the statutes were



XI. 20—CHAIRMAN OF THE POLISH  
CODE COMMISSION 1927, DR. FIERICH

already full of such slavized Roman terms as "obligi", "donacye", "kontrakty", "testamenta". And after Napoleon's fall, the Code Napoleon was retained in force in Russian Poland. Its title-page shows the hybrid result (from an edition of 1896),—a Russian text, for the Poles, of a code frankly called Code Napoleon; and the first section is a literal translation from the French, "Tous les biens sont meubles ou immeubles", "All property is either movable or immovable".

After the World War, the reunited Poles resolutely strove to re-cast and unify their legal system.<sup>20</sup> But it could not be a distinctively Slavic system.

### (III) YUGOSLAVIA

9. The Checks and the Poles had received Christianity from the west,—Latin Christianity from Rome. But the southern and eastern Slavs received Christianity



(Yugoslavia) 10. *Alien Elements*

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from Byzantium,—Greek Christianity. And this difference deeply affected the course of their legal history. Moreover, there were great differences of climate and habits. While one branch of the Slavs had made its permanent home in the vast marshy plains of Poland, another branch found itself equally at home in a land of striking contrast,—the mighty mountain ranges of the Balkans.<sup>21</sup> Serbs, Bulgars, Croats, Montenegrins,—these South Slavs, in various tribes, by A. D. 600 had overrun this region of deep valleys and lofty peaks. It has long been a region of racial strife and tribal warfare between these sturdy and unruly mountaineers. On the east, in Bulgaria, a Slavic shepherd people had settled; but they had early been mastered by the nomadic mounted warriors from Asia, and so their ruling class was of Tartar blood, but slavized. On the west, at the Dalmatian coast, with its deep harbors, its cliffs and crags rising sheer from the sea, and its towns crowded into the narrow beach,<sup>22</sup> the people were nearly pure Slavs, though overlaying an ancient Romanized population.

10. But on both east and west they were in close contact with peoples having highly developed legal systems,—on the east, and very early, with the Greek Empire at Constantinople, where for centuries the Roman laws had prevailed, in the Greek language; and on



XI. 21—CASTLE OF SOKOL, IN SERBIA



XI. 22—CATTARO, IN DALMATIA

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XI. 23—SPALATO, ON THE DALMATIAN COAST

the west, and later, with the Italians at Bologna and Ravenna, where Justinian's laws had recently been resurrected in the 1100's (*post*, Chap. XV). Thus the Slavic legal institutions, in the Balkan peninsula, when they took form, were shaped by these alien systems, ultimately meeting the same fate as the first and the second Slav branches already noticed.

This is illustrated in the law-code of the Duchy of Spalato, in Dalmatia, dating about A. D. 1300. This city<sup>23</sup> arose on the site of the Roman Emperor Diocletian's massive palace, to which he had retired on his abdication, about A. D. 300. (It was here that he made his famous



EC Sunt Statuta & ordinamenta Civitatis  
 & hominum Civitatis Spalati facta edicta & co-  
 dicta per nobilem & sapientem virum dñm Jo-  
 ceualum Iohannis de nobili & honorabili Ci-  
 vitate firmata peritū in iure Canonico & ci-  
 vili honorabilem potatem civitatis Spalati  
 sub anno Dñi Millesimo trecentesimo  
 decimo Indiel decima. ep̄re Sc̄ssimi p̄re  
 dñi Clementis pape q̄nti Ad laudem & re-  
 verentiam om̄ipotentis dei & b̄te marie  
 virginis specialiter b̄ti Domini martini  
 patronoꝝ dicte Civitatis quoz p̄dicto &  
 hōre Sp̄lina Civitas in pacifico statu gubernatur & aliorum b̄ti  
 sc̄oz & sanctoz dei quoz intercessionibus divina maiestas  
 sicōrditer inclinetur ad illuminandum m̄res & aīes hominum  
 eas p̄dicte Ut honeste vivat aliorum nolant q̄m q̄m q̄m  
 q̄ arbuat en effectu & ut debita iusticia equaliter  
 m̄dus univ̄sālter secūdum rectum ordinem gub̄n̄t  
 q̄ p̄me reges regnāt & pot̄tes scribunt iusticia Et ad hoc ut  
 Civitas Spalatina diuino semp auxilio suffragante p̄petue  
 valeat in statu pacifico & tranquillo Nam Roma cum dñm  
 tenuit monarchiam q̄ dñm iugit iusticia in Romanis debet  
 aut in eis iusticia defecit dominum romanor.





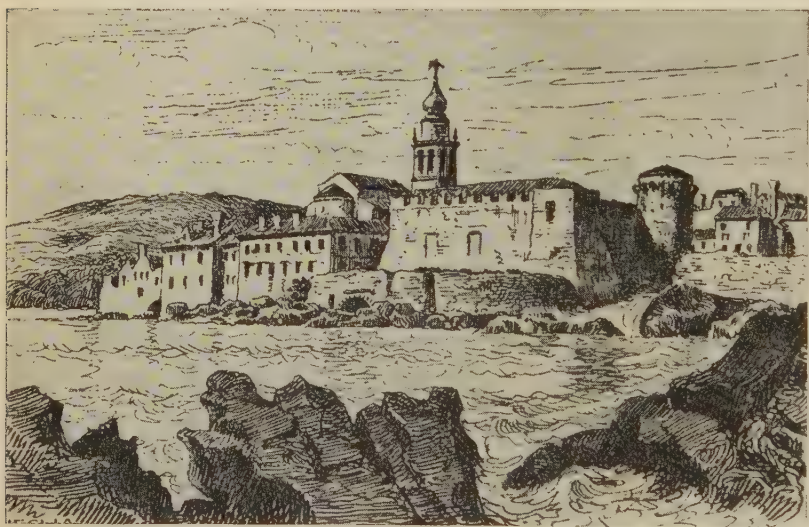
reply to his former colleague Maximian, who wrote to warn Diocletian of the troubles in the empire and to urge him to resume the throne:<sup>f</sup> "You would never" replied Diocletian "make such a proposal, if you could see the fine cabbages which I have raised here with my own hand in my garden"). The population of Spalato was nine-tenths Slavic; but this elaborate code of several hundred sections is in Latin.<sup>24</sup> Venice had conquered this coast three centuries before, and the patriotic ceremony, on every Ascension Day, of the Doge marrying Venice to the Adriatic Sea with a ring, was instituted in celebration of this conquest. The influence of the Roman law from Venice is plainly betrayed in the last sentence of the opening paragraph of the Spalato code; it commands the people that they "live honorably, injure no man, and yield to every one his rights", and this celebrated sentence, of course, is borrowed literally from the opening chapter of Justinian's Digest.

But, for the remaining Yugoslav regions, the modifying influence came from Constantinople, where Roman-Greek law prevailed. Just off Fiume, near Trieste, is the large island of Veglia,<sup>25</sup> once the seat of the Duchy of Verbenik, an ancient Slavic community, and the only one still using the Glagolite script. The Glagolite script arose in this way: About A. D. 900, the great Greek missionary

## *XI. Slavic Legal System*

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Cyril had gone up from Constantinople into Russia and converted the Slavs there and taught them letters, mixing their runes with the Greek alphabet; which has ever since remained the alphabet for Russia, Bulgaria, and Serbia. But much earlier, about A. D. 400, the learned Jerome (translator of the Greek gospels into Latin), who was himself a native of this region, had devised for its people a peculiar alphabet, founded largely on the Slavic runes. This older form was called Glagolite, and was used for the literature of those regions,<sup>26</sup> till superseded in modern times by Latin script. But even today it persists



XI. 25—VEGLIA: CASTLE OF THE DUKE

ԳՐԱՊԵ ԵՃԱՐՅԱՆ ԿԱՄԻ ԺԵՐՄԱՆ ԵՃԱՐՅԱՆ  
 ԼԻ ԽԱԶՅԱՆՔԻ ՄԻՆ. Յ. Դ. ՄԵՆՈՒ ԶԻՆ  
 ԵՒ ՄԵՆՈՒ. ՄԻՆ. ՄԻՆ ԿԱՄԻՆՈՒՄԻՆ.

ԿՐ ՅԵՐՄԱՆ ԴԵՐՄԱՆ ԿԱՄԻՆ  
 ՅԻՆ ԶԻՆ ԴԵՐՄԱՆ ԿԱՄԻՆ ԿԱՄԻՆ  
 ԶԻՆ ԿԱՄԻՆ ԿԱՄԻՆ ԿԱՄԻՆ ԿԱՄԻՆ  
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XI. 26—LAW-CODE OF VERBENIK, A. D. 1388

The opening lines read: "V imye bozhye, amen. Let bozh-yikh tekushtshikh 1388 myetsa yuna den 15 dze statut"

## *XI. Slavic Legal System*

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in the church books, and the Bishop of Dalmatia, in the new nation of Yugoslavia, was not long ago negotiating with the Pope to be allowed to continue the use of this ancient script. So these oldest laws are unique in being written in this Glagolite script.<sup>26</sup> In this Law Code of Verbenik (A. D. 1388), the opening sentence reads:<sup>g</sup>

"In the name of God, Amen. Year of our Lord 1388, month of June, day 15.

"We Count Stephen and Count Anx, having heard the heavy complaints of our faithful subjects of the Verbenik domain, that the people are oppressed, have sent our trusted deputies to summon good and true men from the whole domain, and also women, so that right and truth may be established and wrongs be punished."

But the most noted legal monument of the Yugoslavs is the code of the hero-king of Serbia, Stefan Dushan, who reigned for twenty years from A. D. 1336. His nickname Dushan means "throttler"; for he strangled his own father to reach the throne. His reign is the golden age of the Yugoslavs; and Serbian patriotism dwells on the historic scene of Stefan's coronation.<sup>27</sup> He was educated in Constantinople; and as patron of learning he founded schools, imported foreign scholars, and gave to the Serbs their first national code,—and their last, until our own day. It was written in the Cyrillic (or Russian) Greek alphabet; and naturally it was permeated with Roman-Greek ecclesiastical and civil law. Its first paragraphs read:





XI. 27—CORONATION OF KING STEFAN OF SERBIA



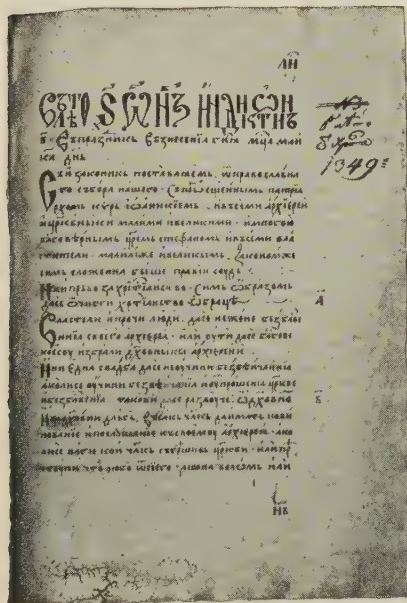
## (Yugoslavia) 10. Alien Elements

"1. Justice shall be done according to the Christian religion.  
2. Nobles and others shall not marry without the blessing of the bishop or of a cleric appointed by him. Marriages not made with the Church's blessing shall be declared void."<sup>h</sup>

The manuscript of the code is in the National Museum at Praha in Bohemia;<sup>28</sup> there are only three extant; and it is a melancholy fact that Serbia does not possess any of the original manuscripts of her historic national code.

11. For Stefan's successors quarreled; the racial Slav trait of dissension undermined the kingdom; and within a

century after Stefan, about A. D. 1460, Serbia and the Balkans had become a fief of the Mohammedan Turkish empire. A large number of the Yugoslavs became Mohammedans; and one of the most important Turkish law schools, educating judges in Mohammedan law, was located in Sarayevo, in Bosnia. Then, in the last century, Austria came to dominate in the Balkans, and thus a



XI. 28—CODE OF STEFAN DUSHAN



XI. 29—THE COURT-HOUSE AT SARAYEVO

## (Yugoslavia) 11. *Alien Elements*

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third alien element, the Germanic-Romanesque, entered into the legal system. In 1844, Serbia, being semi-independent of Turkey, adopted its own civil code, based largely on the Austrian model. The court-house<sup>29</sup> at Sarajevo (the capital city of Bosnia, and the starting point of the great world-conflagration of 1914), is a symbol of the hybrid legal character of this region; for it is a court-house built by the Austrians, in a Turkish style of architecture, for a Slav city having a population one-half Slav and one-half Mohammedan.

The Yugoslavs are now independent politically. The capital city of Belgrad is today adorned with a royal palace, a university, and other public buildings in a cosmopolitan architecture that would suit almost any capital. French and German legal science for a century past has shaped the law of Yugoslavia; and no distinctive Slavic legal system can be found here.

### (IV) RUSSIA

12. The fourth principal branch of the Slavic race includes, of course, several groups, differing in dialect and in customs. The Russian territory covers more than one-half of the area of Europe. But in spite of its vast area, it is the only branch of the Slavic race that has achieved and maintained political unity and independence. This



## *XI. Slavic Legal System*

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welding, however, was perfected only by the hammer of despotism.<sup>30</sup>

There were four marked periods in its legal evolution, beginning in the 1100's, the 1400's, the 1600's, and the 1800's. The first period represents primitive legislation and the foundation of numerous separate principalities in Kief, Novgorod, Moscow, and elsewhere. The second period represents the arrival of political unity and a centralized feudalism. The third period saw the establishment of autocracy, and the development of that strong central bureaucracy which necessarily accompanies an efficient despotism. The fourth period was marked by the creation of a genuine national legal system.

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CHART OF PERIODS

|       |                              |                    |
|-------|------------------------------|--------------------|
| A. D. |                              |                    |
| 1100  | Primitive legislation        | Code of Yaroslav   |
| 1200  | Separate principalities in   |                    |
| 1300  | Kief, Novgorod, Moscow       |                    |
| 1400  | Political unity attained,    | Codes of Ivan III  |
| 1500  | with centralized feudalism   |                    |
| 1600  | Autocracy established        | Code of Alexis     |
| 1700  | Bureaucracy developed        |                    |
| 1800  | Complete legal system framed | Code of Nicholas I |



XI. 30—MAP OF RUSSIA

## *XI. Slavic Legal System*

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XI. 31—OLEG THE WISE

And yet this system, from the very beginning, was not, and could never be, purely a Slavic product. It was hybrid; for it was made up of Germanic, Slavic, and Greco-Roman elements.

13. Slavic Russia was overrun in the 800's by bands of bold Germanic land-rovers from Scandinavia. Oleg the Wise was the greatest of these early Northmen, the second in time; he became master of Kief, in the southwest.<sup>31</sup> He and his fierce vassals—later known as “boyars”, and famous in Russian folklore—organized the Slavic people,—much as Duke Rollo and his Northmen,

### *(Russia) 13. Germanic Element*

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about the same period, conquered and organized Normandy. These Germanics, however, were essentially traders; and the earliest document of Russian history is a treaty of commerce between Oleg and the Greek Emperor

at Constantinople. Their chief trade was in slaves; during three centuries they made merchandise of the conquered Slav population to the effete Greek emperors (some scholars believe that our



XI. 32—YAROSLAV THE JUST

## *XI. Slavic Legal System*

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word "slave" signified originally "a Slav"); and the vast extent of serfdom in later Russia originated in this early slave-system. Meanwhile, under Duke Vladimir, about A. D. 1000, the Russians accepted Christianity from the Greek missionaries coming from Constantinople. The Greek alphabet was now adapted by the missionaries to the language of the Slavs, who had no books and no alphabet of their own but only a few crude runes, or word-symbols; and henceforward the Greco-Roman religion, morals, and law dominate in Russian life.

The first traditional lawgiver is Yaroslav the Just,<sup>32</sup> son of Vladimir; he lived about A. D. 1015-50; but the oldest extant text of his code dates actually from his successors, about A. D. 1200. This Code of Yaroslav was called "Russian Truth" ("Pravda Russkaya"); and it was really drafted or inspired by the Greek ecclesiastics, for the information of the church courts. It represents a mixture of Germanic, Slavic, and Roman-Greek elements.<sup>33</sup> It was modeled on the Roman-Greek law-books of Constantinople; and the Greek church had already for three centuries been modifying the native Slav customs in family and property relations. How primitive was this code can be seen from the first paragraph, in which the churchly legislators were attempting to restrict while tolerating the fierce practice of the blood-feud,—a practice



# СЯЯРОСЛАВЪ БВОДНМЪРН

**П** РАВДЯРСКАЯ А ПЕОКЕНТЪ А МЪА ДУА  
ТОА ВСТИ ТН БРАТЪ БОАТА. А МБ ОЦНА СНИ  
А МБ БРАТЪ УАДЪ А МБ РАТЪ МЪНКИ АЩЕ АН  
НЕ БИДЕ ТАКЪ ТН ГОА ВСТА ТИ ПОА МОНТИ ДА  
ГОА ВСТ П ГРН А МБ БИДЕ ТЪ КНА МБ ДОУА  
НАНТИ ОНА КНА А П АЩЕ АН БИДЕ ТЪ РИ  
НЪ НАН ГРАДЪ А МБ КИ ПЕЦЕ А МБ ОНА КНА  
БИРАСКЪ А МБ А МБ УНКИ А МБ ОЦ ГОН  
А МБ ОВЪННИЪ ТО АА ГРН ПОА МОНТИ ДАНЪ

**П** ОЯРОСЛАВЪ МПАКН СОККИ ПИВШЕ САНЪ  
НГО. И ДА СЛАВЪ СТИ СЛАВЪ ВСЕГОА ДЪ И  
А МБ МНХЪ КОСНАУАКО ПЕРЕНТЪ НН  
КН Д ОА. И ОА МНША ОУКНИ ЕНН ЕДГОА ОУ  
НОКНА ДН СМЪ КИ ПАТИ А МБ БИРАКО  
ЖЕ ЯРОСЛАВЪ СДНАЯ ТАКО ЖЕ СМЪ ВЕРО  
ОСТАВША :

**А** МБ КТО ОУКНИ ТЪ КНА ДА А МБ А ВРАДЪ ОН  
А ГОА ОВНИКА НЕНШЕ ТЪ ОН РИ ВНИ ПЛА  
ТИТИ. ВЪУАКН МБ КЕР ВНИ ГОА ОУА МНТА  
ТО П ГРН ПАКНА ЮДИНЪ ТО АА ГРН

**К** ОТО СЛАМБЕР ВНАУНЕТЪ ПЛАТИТИ ДН  
КВН МБ РИ КВАЛКОА БЪТЪ ДА ПЛАТИТИ  
ВНО ДАНЪ МБ БЪТЪ ГОА ОУНИКАНА А ПЛА

## *XI. Slavic Legal System*

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which lasted in Russia long after it had died out in western Europe:<sup>i</sup>

*"The Justice of Yaroslav son of Vladimir:  
Russian Truth*

- "1. If a man kills a man, vengeance may be done by brother for brother, or son for father, or father for son, or uncle for nephew.
- "2. If there is none to do vengeance, then shall the killer pay eighty shillings if the killed is a chieftain or a chieftain's vassal.
- "3. If the killed is a Russ or a merchant or a henchman or a sworded man or a Slav, then forty shillings shall be paid."

14. By the 1400's the second period in Russian history is entered. The many petty chieftains in this broad land had been consolidated into an independent kingdom, under Ivan III, known ever since as Ivan the Great. The country had been freed from the overlordship of the Asiatic Tartars, and Moscow was now the capital. Ivan III, by marrying the daughter of the last Greek emperor, made Russia the heir to the Greek Imperial traditions. Ivan III began the vast fortress-city and palace of the Kremlin, which was thereafter to be the centre of Russian traditions of government and justice;<sup>34</sup> and this second period now sees the establishment of political unity and a centralized feudalism, like that of William the Conqueror.

There were indeed many judges in the ducal or feudal courts, doing a crude justice based on local customs. Ivan



XI. 34—THE KREMLIN



## *(Russia) 14. Ivan the Terrible*

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once called to account a local judge for accepting money from both parties, and more from one party than the other; whereon the magistrate naively replied, "Sire, naturally I should put more faith in the word of a rich man than of a poor man". But gradually the theory prevailed that justice was the personal prerogative of the supreme central ruler at Moscow. In the Kremlin was the palace, and from a window in the corner of the Throne Room a rope hung down, with a basket at the end, and each day the prince might draw up the basket and read the petitions of grievance from his subjects. Even as late as the day of Peter the Great, A. D. 1700, it was still the popular custom to go to the Cathedral of the Archangels, a church within the Kremlin walls, containing tombs of the Tsars, and place on the tombs the petitions of grievance, and the Tsar would go and read them; for he once held a court of justice there.

The title of Tsar, or Caesar, was first assumed by Ivan IV (the Terrible), in this period, about A. D. 1550, and his strong personal character served to fix on Russia until modern times the principle of personal absolutism. Ivan was the Tsar who built the Cathedral of St. Basil, within the Kremlin wall,—the most bizarre edifice in the world's architecture, and a fitting memorial of his bizarre character. He led the nation ably in its external troubles;





XI. 36.—IVAN IN REMORSE AT SLAYING HIS SON.

## *(Russia) 14. Ivan the Terrible*

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and his name goes with a crude code of A. D. 1550. This code ("sudyebnik"), made after calling a national assembly ("zemsky sobor") of nobles, consisted of only 100 articles,<sup>11</sup> and began, like all primitive codes, with rules about the mode of trial; it bore date "year 7058," for up to Peter the Great's time the Russian laws were still dated by the Greek Church calendar, i. e. from the year of the Creation of the World, 5508 B.C.

But, in spite of this crude code, the arbitrary methods of his domestic government must have debased and stifled all conceptions of law and justice. He was the founder of the bureau of secret political police, which cursed Russia ever after, and violated all fundamentals of justice; and in personal character he was nothing less than a monster of unparalleled ferocity and incredible depravity. A sober German historian calls him a "raging hyena."

To describe in a few words his lifelong enormities is impossible. He put to death his own Chancellor with his entire family. He grilled alive one of his princes in an enormous frying-pan. He nailed the French ambassador's hat to his skull, for a fancied insult. He ordered whole villages to be drowned. He forced fathers to execute their sons, and sons their fathers. He even killed his own son in a fit of anger.<sup>12</sup> Ivan invented the punishment of



XI. 37—IVAN THE TERRIBLE

## (Russia) 14. *Ivan the Terrible*

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mince-meating, i. e. of slicing the culprit gradually into a thousand pieces. On one occasion he presided at the trial and execution in the Kremlin of two hundred persons in four hours,—their modes of death varying between hanging, boiling, strangling, stabbing, beheading, and mince-meating.<sup>37</sup>

The Kremlin enclosure, just inside the Gate of the Redeemer, was originally the scene of his executions. But afterwards they took place outside the Gate in the Grand Square;<sup>38</sup> and to the ikon or image of Christ above this gate the condemned ones addressed their last prayer. In the Tsarina Tower, facing the Grand Square, Ivan was accustomed to sit and enjoy the dreadful spectacle, when he was not taking part himself as executioner; and in the Tower of Constantine and Helen were the torture chambers for securing the accused's confession.

The Grand Square witnessed thousands of judicial murders done under Ivan IV. All other tyrants of history are spotless compared with him; and yet his reign, beginning in boyhood, lasted for fifty years, undisturbed. There is a vein of melancholy submissiveness in the Russian people. In an epoch when the heroic Dutch were expelling Philip II; when the resolute English were beheading Charles I; and when the courageous German peasants were even taking up their pitchforks in hopeless

## *XI. Slavic Legal System*

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rebellion against their feudal barons,—at that same period the Russian people, on the contrary, patiently endured this homicidal maniac as their ruler for a whole generation; the best Russian historian tells us<sup>i</sup> that “never a spark of open protest appeared from the people”.

Ivan cruelly killed the only official who openly rebuked him, the Archbishop Philip. That incident began in the Cathedral of the Assumption. This patriot, the Archbishop, once a boyhood playfellow of Ivan's, was now a priest of unblemished integrity holding the highest office; and in Russia the Church has always wielded equal influence with the Tsar. The Archbishop had often privately pleaded with the Tsar to restrain his wicked passions. Now at last, at the public mass in the Cathedral of the Assumption, in 1568, when the Tsar came with effrontery to ask a blessing, the indignant Archbishop denounced him before the congregation in fearless language: “Instead of God's blessing, fear thou rather the judgment of God, to whom only a pure heart can be offered. How long will thy unrighteousness reign on Russian soil? The very heathen have laws and justice, only in Russia is there none. But there is a judge on high; how wilt thou dare appear before him?” The enraged Ivan swore aloud in the church that he would behave as he saw fit, arrested the Archbishop at the next





XI. 38—THE GRAND (OR RED) SQUARE, MOSCOW



## *(Russia) 14. Ivan the Terrible*

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high mass, cast him into a prison cell, and had him strangled.

This ruthless personal dictatorial justice, as a trait of the Russian ruling family, endured even till the time of Peter the Great, in the early 1700's. When Peter was menaced by a rebellion of his famous bodyguard, the Streltsi, and suspected his own sister Sophia of complicity, he kept fourteen torture-chambers with gridirons burning day and night, and attended unwearingly, even at the torture of his sister. In three weeks one thousand of these Streltsi were executed in the Grand Square; and Peter not only beheaded one hundred of them with his own hands, but cordially invited the foreign ambassadors to come and wield the axe with him! In the year 1721 he put his own son Alexis on trial for sedition; whether Alexis was guilty or not, historians differ; but it is known that Alexis was tortured by his father's own hand, and died on the next day after this dreadful act.<sup>jj</sup>

15. Such a record of arbitrary rule explains the slow development of systematic law and procedure in Russia. An English official, writing in rhymed letters to his English friends on Russian manners, in the same year 1568 of Ivan IV's persecution of the Archbishop, thus sums up his observation:<sup>k</sup>

## XI. *Slavic Legal System*

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“In such a savage soile, where lawes do bear no sway,  
But all is at the king his will, to save or else to slay,  
. . . . Conceive the rest your selfe, and deeme what  
lives they lead,  
Where luste is Lawe, and subjects live continually in  
dread”.

And an observant English ambassador, Fletcher, about A. D. 1590, in the next reign, thus concludes his observations on the Tsar's courts:<sup>1</sup>

“They have no written law, save onely a smal booke, that containeth the time and manner of their sitting, order in proceeding, and such other judicial forms and circumstances; but nothing to direct them to give sentence upon right or wrong. Their onely law is their ‘speaking law’, that is, the pleasure of the prince, and of his magistrates and officers. Which sheweth the miserable condition of this poore people that are forced to have them for their law and direction of justice, against whose injustice and extreame oppression they had neede to be armed with many good and strong lawes.”

The regular procedure of the courts, as late as the end of the 1500's, seems to have still retained the crudest features, content to employ constantly the compurgation oath, the lot, and the duel in its coarsest form, as modes of decision. The criminal procedure is thus described by an Austrian envoy, a famous cosmopolitan traveler, sometimes termed “the discoverer of Russia”; he writes about the middle of the 1500's:<sup>m</sup>

[*Criminal Procedure in the 1500's.*] “Whoever wishes to lay an accusation against another for theft, plunder, or manslaughter, goes

## *(Russia) 15. Procedure in the 1500's*

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to Moscow and asks that such an one be summoned to justice. A process-server is given to him, and he appoints a day, which he announces to the man against whom the accusation is laid, and on that day he brings him to Moscow. Afterwards, when the guilty man is brought to judgment, he often denies the crime which is laid to his charge. The testimony of one nobleman is worth more than that of a multitude of low condition. Attorneys are very seldom allowed: every one explains his own case. If the prosecutor produces witnesses, then both parties are asked whether they will stand to their words. The common reply to that is, 'Let the witnesses be heard according to justice and custom.' If they bear witness against the guilty man, he immediately objects, makes exceptions against themselves and their testimony, saying: 'I demand an oath to be administered to me, and I commit myself to the justice of God, and desire a fair field and a duel.' And thus, according to the custom of the country, a duel is adjudged to them. Either of them may appoint any other person to take his place in the duel, and each may supply himself with what arms he pleases, except a gun or a bow. But they generally have oblong coats of mail, sometimes double, a breast-plate, bracelets, a helmet, a lance, a hatchet, and a peculiar weapon in the hand, like a dagger sharpened at each end, which they use so rapidly with either hand as never to allow it to impede them in any encounter, nor to fall from the hand; it is generally used in an engagement on foot. They commence fighting with the lance, and afterwards use other arms. . . . . Each side has many friends, abettors, and spectators of the contest, who are quite unarmed, except with sticks, which they sometimes use. For if any unfairness seem to be practised upon either of them, the friends of that one immediately rush to avenge his injury, and then the friends of the other interfere, and thus a battle arises between both sides; which is very amusing to the spectators, for the hair of their heads, fists, clubs, and sticks burnt at the points, are all brought into play on the occasion."



## XI. *Slavic Legal System*

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The civil procedure was no less crude in methods.<sup>1</sup> It is thus described, as of the end of the 1500's, by the English envoy Fletcher:<sup>2</sup>

[*Civil Procedure in the 1500's.*] "Their courts of civil justice for matters of contract, and other of like sort, are of three kinds, the one being subject unto the other by way of appeale. The lowest court (that seemeth to be appointed for some ease to the subjects) is the office of the 'bugnoy starust', that signifieth an alderman, and of the 'sotskoy starust', or bailief of the soake or hundred. . . . . The second is kept in the head townes of every province or shire, by the said dukes and diacks, that are deputies to the foure lords of the chetfirds (as before was sayd). From these courts they may appeale, and remove their suites to the chiefe court, that is kept at the Mosko, where are resident the officers of the foure chetfirds. These are the chiefe justices of judges, every of them in all civill matters that grow within their severall chetfird or quarter, and may be either commenced originally before them, or prosecuted out of the inferiour courts of the shires by way of appeale.

"Their commencing and proceeding in civill actions is on this manner. First, the plaintife putteth up his supplication, wherein hee declareth the effect of his cause or wrong done unto him. Whereupon is granted unto him a 'wepis' or warrant, which hee delivereth to the 'praestave' or sergeant, to doo the arrest upon the partie whom he meaneth to implead. Who, upon the arrest, is to put in sureties to answeere the day appointed, or els standeth at the sergeants devotion, to be kept safe by such means as he thinketh good. The sergeants are many, and excell for their hard and cruell dealing towards their prysoners; commonly they clappe irons upon them, as many as they can beare, to wring out of them some larger fees. Though it bee but for sixe pence, you shall see them goe with chaynes on their legges, armes, and necke.

## *(Russia) 15. Procedure in the 1500's*

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"When they come before the judge, the plaintife beginneth to declare his matter after the content of his supplication. As for attourneis, counsellours, procuratours, and advocates, to plead their cause for them, they have no such order, but every man is to tell his owne tale, and plead for himselfe so well as he can.

"If they have any witsnesse or other evidence, they produce it before the judge. Such kinde of suites as lacke direct evidence, or stande upon conjectures and circumstances to bee waighed by the judge, drawe of great length, and yeeld great advantage to the judge and officers. If the suite be upon a bond or bill, they have for the moste parte good and speedy justice. If they have none, or if the truth of the cause cannot so well bee decerned by the plea or evidence on both partes: then the judge asketh eyther partie (which hee thinketh good, plaintife or defendant) whether hee will kisse the crosse upon that which he avoucheth or denieth. Hee that taketh the crosse (being so offered by the judge) is accounted cleare, and carrieth away the matter. This ceremonie is not done within the court or office, but the partie is carried to the church by an officer, and there the ceremonie is done: the mony in the meane while hanging upon a naile, or else lying at the idols feete, ready to be delivered to the partie as soone as he hath kissed the crosse before the said idol. This kissing of the crosse (called *Creustina chelovania*) is as their corporall oath, and accounted with them a very holy thing, which no man will dare to violate or prophane with a false allegation.

"If both parties offer to kisse the crosse in a contradictorie matter, then they drawe lottes. The better lotte is supposed to have the right, and beareth away the matter."

Even before the Tsar himself, the same primitive methods of the lot and the duel still obtained, as we learn from the experience of an English merchant who sought

## *XI. Slavic Legal System*

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the Tsar's justice to decide a money dispute with some Russian merchants:°

[*A Civil Trial before the Tsar.*] "Sundrie Russian merchants . . . . . were then driven to credite us and compound in value untill the next returne. At which time, notwithstanding good accompt in the value of 600 robes, there grewe question by their double demand. So in April Anno 1560, before my comming from Moscovia, they obtained trial by combat or letter to have their summe double, or as I proffered 600 robes. For combatte I was provided of a strong willing Englishman, Robert Best, one of the companies servants: whome the Russes with their Champion refused. So that we had the words of our privilege put in effect, which were to draw lots. The day and maner of triall appointed by the Emperour at his castle in his palace and high Court of Moscovia was thus: The Emperours two Treasurers, being also Chancelours and chiefe Judges, sate in court. They appointed officers to bring me, mine interpreter, & the other through the great presse within the rayle or barre, and permitted me to sit downe some distance from them: the adverse parties being without at the barre. Both parties were first perswaded with great curtesie, to wit, I to enlarge mine offer, and the Russes to mitigate their challenge. Notwithstanding that I protested my conscience to be cleere, and their gaine by accompt to bee sufficient, yet of gentlenes at the magistrates request I made proffer of 100 robes more: which was openly commended, but of the plaintifes not accepted. Then sentence passed with our names in two equall balles of waxe made and holden up by the Judges, their sleeves stripped up. Then, with standing up and wishing well to the trueth attributed to him that should be first drawen, by both consents among the multitude they called a tall gentleman, saying: Thou with such a coate or cap, come up: where roome with speede was made. He was commanded to hold his cappe, wherein they put the balles, by the crowne upright in sight, his arme not abasing. With like cir-

## *(Russia) 15. Procedure in the 1500 s*

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cumspection, they called at adventure another tall gentleman, commanding him to strip up his right sleeve, and willed him with his bare arme to reach up, and in Gods name severally to take out the two balles: which he did, delivering to either Judge one. Then with great admiration the lotte in ball first taken out was mine: which was by open sentence so pronounced before all the people, and to be the right and true parte. The chiefe plaintifes name was Sheray Costromitsky. I was willed forthwith to pay the plaintifes the summe by me appointed. Out of which, for their wrong or sinne, as it was termed, they payd tenne in the hundred to the Emperor. Many dayes after, as their maner is, the people took our nation to be true and upright dealers, and talked of this judgement to our great credite."

16. However, a new period for Russia had already dawned before Peter's day, under the Tsar Alexis, a constructive mind, who reigned from A. D. 1645.<sup>39</sup> This marks the third period in Russian government and law. The definite cleavage now took place, in future destiny, between a representative



XI. 39—THE TSAR ALEXIS



## *XI. Slavic Legal System*

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XI. 40—NASHCHOKIN, THE REFORM  
CHANCELLOR

government and an autocratic government. There had indeed been a Duma, or king's privy council, which functioned also as a Supreme Court, and might have become an independent King's Bench, as in England. And there had been an occasional Zemsky Sobor, or national assembly, which might have become a permanent representative Parliament, as in

England. But these embryo institutions failed to mature. The historic associations clustering around the Kremlin are not those of a Westminster, but rather of a Newgate. All constitutional power, legislative, judicial, and executive, henceforth centered in the Tsars.

But Alexis was a worthy wielder of this power. The great figure of the 1600's is Alexis' chancellor, Nashchokin, a genuine organizer and reformer.<sup>40</sup> Nashchokin was much hated for his reforms; but he was efficient. He built up a centralized bureaucracy which enabled Russia



to cope with the complexity of its enormously increasing dominions. One of his epigrams was: "Better than strength is thought. Let us sell our soldiers and buy a man of thought". Nashchokin may almost be compared to Louis XIV's great minister Colbert; for he summoned a codifying assembly and in six months produced a concise code,—known as the *Ulozhenie*, or Regulations, of Alexis. It was framed largely on the basis of the Greco-Roman church and civil laws, and it managed to carry Russia haltingly through two centuries.

But by the time of Peter the Great,<sup>41</sup> in the early 1700's, the most pressing internal problem had become the codification of the ever-increasing mass of decrees, regulations, and local codes which had accumulated in the wide Russian territories. The administration of justice was largely done in the local peasants' courts, by unlearned magistrates, on the basis of custom and morality. No legal profession, in our sense, had yet developed, even in Peter's time; there were no jurists, no professors of law, no law-schools, no Inns of Court, no law-treatises, no reports of decisions. There is an anecdote of Peter the Great, when he visited England, and was asked about lawyers in Russia; he replied, "I have only two lawyers in Russia, and when I get back I mean to kill off one of them". The only judicial or juristic figure who is found



XI. 41—PETER THE GREAT

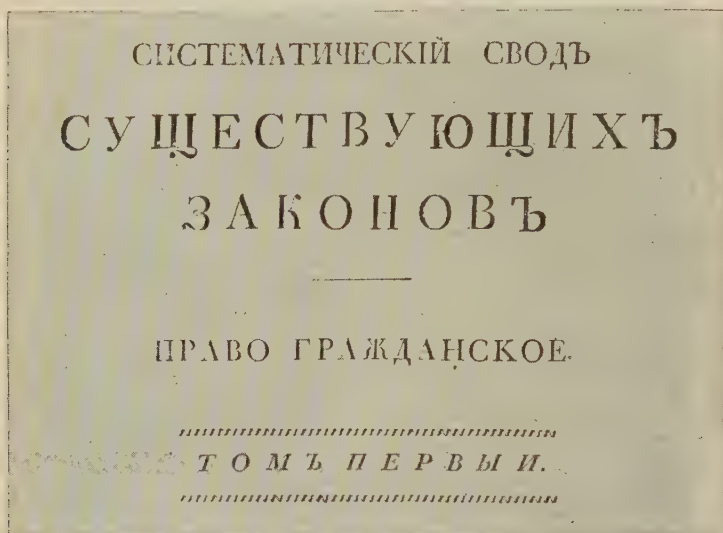
named in five centuries of Russian history is the Chancellor Nashchokin above mentioned. The decrees and ordinances were in a formless chaotic mass. How enormous had become the problem of codification may be seen from the fact that in the period 1600-1800 no less than thirty thousand laws and decrees were on record. So Peter appointed a codifying commission in the year 1700.

But now was seen the astonishing spectacle of ten successive code-commissions, one after another, appointed by six successive Tsars, each commission sitting for years at a time, and deliberating through one hundred and twenty-five years in all, without reaching a result. The report of the tenth commission, dating about 1815, brought forth materials for a draft code;<sup>42</sup> but got no further. No finished code or compilation ever matured. Nothing but the racial Slavic tendency to theoretical dissension and indecision can account for this extraordinary failure.

Meantime, however, the sixth of these ten abortive commissions did attract wide notice throughout Europe. It was appointed by Catherine II, the German-born wife of Peter's grandson. The Tsar's justice in Catherine's day was in low repute; she corruptly and callously sold her offices and her justice to the highest bidder. A

## *XI. Slavic Legal System*

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XI. 42—DRAFT CODE OF 1815

popular proverb ran:<sup>p</sup> “Zakon chto dyshlo; kda povernich, tuda y vyshlo”; “Justice moves like the tongue of a wagon; it turns whichever way you pull it”. Another proverb said: “Do not fear the judgment; fear the judge”. Nevertheless, Catherine,<sup>43</sup> being a brilliant showy character, undertook to stage one of the most pretentious programs of law and justice ever recorded in history. On July 31, 1767, she summoned all the dignitaries of the realm to the Kremlin, with a formal pomp whose description reads like an imperial coronation. How competent the assembly was for the task may be inferred from





XI. 43—CATHERINE II, WOULD-BE CODIFIER



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the fact that some of the delegates could not even write their own names. But the brilliant Catherine had read the latest fashionable books of Beccaria, Montesquieu, and other philosophers and reformers of the west; and she announced to the assembled dignitaries her so-called Instructions ("Nakaz") for a code.<sup>44</sup> These Instructions were really a summary of principles, in some seven hundred sections; and she had composed into them a pretentious farrago of benevolence, virtue, equity, and abstract wisdom which reads like a charter of the millennium. The book of Instructions was immediately translated into half a dozen European languages; it drew from Frederick the Great a letter of fatuous flattery. The Code Assembly met in the Golden Hall of the Granovitaya Palace, and set to work; it was in this hall that the last of the ephemeral National Assemblies had met, a century before; and here the earlier Tsars had sat to do justice.<sup>45</sup> And now all Europe awaited the result of this assembly.

But the result, as before, was nothing. At the end of six months Catherine impatiently dissolved the general assembly and sent them home, each with a gold medal of honor; certain committees remained in deliberation for another seven years, agreed on the classification of materials, but got no further; and were finally disbanded by

THE  
GRAND INSTRUCTIONS  
TO THE  
COMMISSIONERS  
APPOINTED TO FRAME  
A NEW CODE of LAWS  
FOR THE  
RUSSIAN EMPIRE:

COMPOSED BY  
Her Imperial Majesty CATHERINE II.  
EMPRESS of all the RUSSIAS.

To which is prefixed,  
A DESCRIPTION of the Manner of opening the  
COMMISSION, with the ORDER and RULES  
for electing the COMMISSIONERS.

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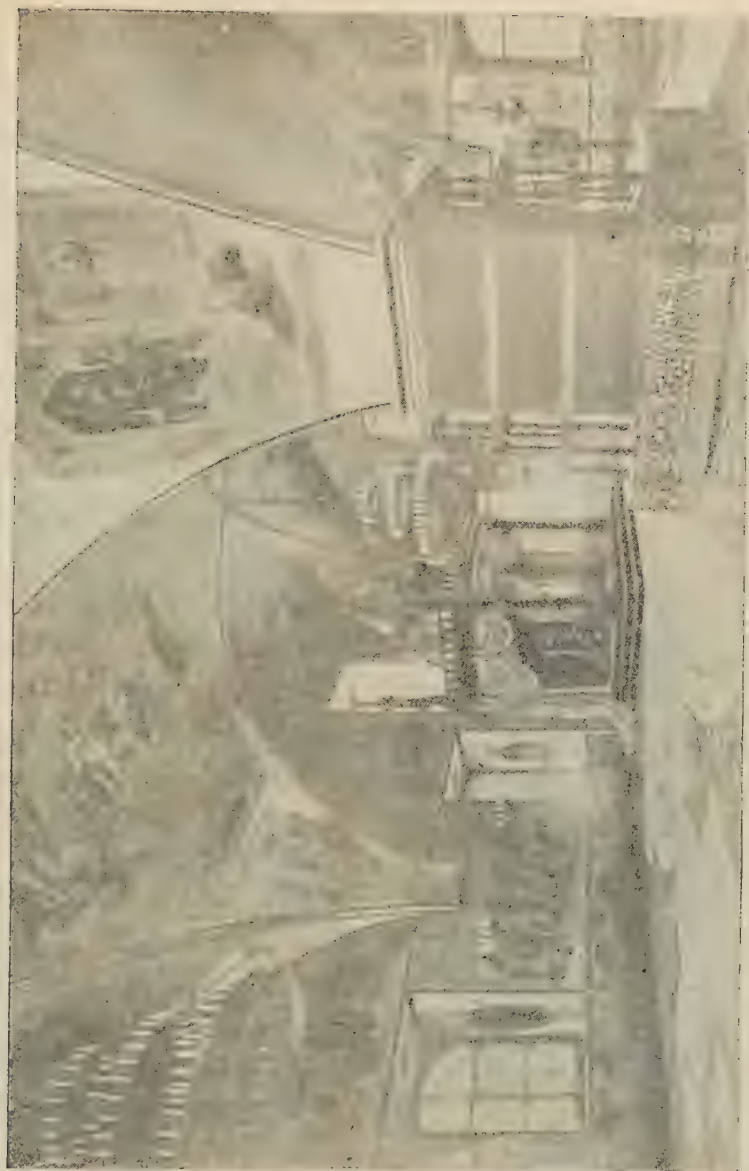
Translated from the Original, in the RUSSIAN Language,  
By MICHAEL TATISCHEFF, a RUSSIAN Gentleman;  
And published by PERMISSION.

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L O N D O N:  
Printed for T. JEFFERYS, at the Corner of St. Martin's Lane,  
Charing-Cross. MDCCLXVIII.

XI. 44—CATHERINE'S CODE INSTRUCTIONS





XI. 45—GOLDEN HALL OF THE GRANOVITAYA PALACE

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the fickle empress in 1774. The Code Assembly had begun as a parade; it ended as a parody.<sup>4</sup>

17. But the day of a real legal system arrived for Russia fifty years later. The fourth period of Russian legal history opens under the wise and conscientious Emperor Nicholas I. He was inspired by his chancellor, Michael Speransky.<sup>46</sup> Speransky had started as a professor of mathematics; he ended as one of the greatest legislative geniuses of the century.<sup>7</sup> It was his ambition to create a complete legal system for Russia; and though

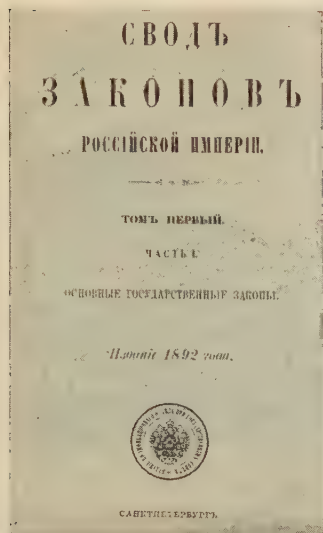
he suffered long delays, and even exile, he triumphed finally. In 1826 the new Emperor Nicholas authorized him to assemble a commission of jurists. They first spent four years in collecting and printing all the materials since Alexis' Code of 1649, in chronological order,—making forty-seven volumes, thirty-one thousand and laws in all. They



XI. 46—COUNT MICHAEL SPERANSKY,  
THE CODIFIER



(Russia) 17. Code of 1835



XI. 47—SVOD ZAKONOF, THE  
CODE OF 1835

then proceeded to digest these laws into a veritable code. The task occupied six years in all; and it is recorded that the Tsar Nicholas personally attended the commission's meetings, and that every final draft was verified by him. "Svod Zakonof", "Collection of laws", was the name of the code.<sup>47</sup> It was in fifteen books, containing forty-two thousand articles, and went into force on Jan. 1, 1835; and every ten years or so thereafter the intervening new an-

nual laws were interpolated at the proper place and a new edition printed.

The Svod Zakonof had compiled the laws into manageable form and had systematized the administration. On this basis, it now became the task of the Emperor Alexander I to build a reform of the laws and institutions themselves. Beginning with the abolition of serfdom in 1861, these reforms culminated in the statute of Nov. 20, 1864, for the organization and procedure of courts of justice,—a statute which embodied the most advanced

## *XI. Slavic Legal System*

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XI. 48—PALACE OF THE SUPREME COURT, MOSCOW

principles of modern times. The re-casting of the entire substantive law was then undertaken; a scientific criminal code was enacted in 1903; and a new civil code was laid before the newly-created Legislature ("Duma") in 1907. And so, gradually through a century, the bureaucracy of an autocracy was re-moulding into a national system the complex fabric of law and justice for the vast Russian empire.

But this fabric, though genuinely Russian, was not distinctively Slavic. Catherine had built within the Kremlin the Palace of the Supreme Court; on each side of the cupola is the word "Zakon" ("Law").<sup>48</sup> And the elements of the new codes were as little purely Slavic as is

## *(Russia) 18. Revolution of 1917*

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the architecture of this court-house; for example, Book II, of the Civil Code, on Property, began exactly in the words of the Code Napoleon, "All property is either movable or immovable". Yet the codes did represent at last a true legal system, unique to Russia.

Then came the catastrophe of 1917.

18. History seems to show that only a despotism (a rational one, if possible, like that of a Nicholas, or a Napoleon) can ever hold a Slavic people together in a solid political and legal system. A supreme test came on those fateful days of November, 1917, when the emperor had been quickly deposed, the Kerensky provisional government of intelligentsia took charge, and a genuinely representative democracy at last dawned, after decades of aspiration. At this crisis of modern Russia's history, the Bolshevik conspirators, commanding only a handful of common soldiers, made an armed gesture of disorder. They began by closing the doors of the new Parliament. But then, when prompt Napoleonic action, by counterforce, was needed, the fatal Slav trait of unpractical dissension spelled failure; for the intelligentsia government now wasted three crucial days in disputing among themselves what was best to do.<sup>a</sup> In that brief interval the Bolsheviks supplied the decision of brute force; and the inability of Slavs to unite delivered Russia into the hands

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of these ferocious political lunatics. Their reign of terror renewed the memories of Ivan the Terrible. Under Soviet Bolshevism, Russia had merely exchanged a rational despotism for an irrational one.

There is indeed supposed to be a constitution; and a new legal system. There are also courts. As a sample, however, of the ideas of law and justice in these courts may serve a recorded incident of 1918. A man was charged in one of the lower courts with robbing money from a woman who was selling newspapers on the street-corner. His plea was that he was justified because she had got the money by selling papers to monarchists and other unworthy persons, while he was a good Bolshevik and hence had a better claim to the money. The courtroom was crowded,<sup>50</sup> and the judges solemnly left it to a vote of the spectators whether he should restore the money!



XI. 50—A REVOLUTIONARY TRIBUNAL



(Russia) 17. Revolution of 1917

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XI. 51—THE SUPREME REVOLUTIONARY TRIBUNAL, 1918

There is also now a Supreme Court, and a Ministry of Justice, so-called.<sup>51</sup> But in the files of the Federal State Department there is a significant memorandum from Consul Imbrie, that typical sturdy American who later passed away in Persia. As consul at Petrograd, during the Bolshevik Revolution of 1917, Imbrie forwarded to Washington a list of the new cabinet of Lenin's officials. One title on the list was "Commissar of Justice". An asterisk to this title pointed down to a sarcastic footnote by Imbrie: "A useless title. There is no justice in Soviet Russia. The world's greatest sinecure, next to taking moving pictures of a glacier, is the position of Commissar of Justice in Russia".



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—In closing this survey of the four great branches of the Slavic race, one may better appreciate the reasons for the generalization offered at the beginning, namely, that with all that race's contributions to the world's thought, it has nevertheless not developed any distinctive, purely Slavic legal system. Those reasons are, first, the intrusions of other races; secondly, during the formative stage, the close proximity of more highly developed legal systems; and thirdly, and perhaps most important, the racial tendency to egocentric unpractical dissension over theories and ideals, which has left the Slavic peoples always politically divided.

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THE  
GERMANIC  
LEGAL SYSTEM





## XII

### *The Germanic Legal System*

#### *(I) First Period*

1. Odin and Valhalla—Predatory conquest, the Vikings' vocation.
2. Germanic justice secular, not priestly, and democratic, not monarchic—The Ting, and the Hill of Laws, in Iceland—Law-men and law-speakers—Procedure.
3. The lawsuit in Njal's Saga—The deemster in the Isle of Man.
4. Four periods of Germanic law.

#### *(II) Second Period*

5. Migrations from Northern and Eastern into Western and Southern Europe—Law "personal" and written.
6. Code of the Salic Franks—Edict of the Lombards—Visigothic Code—Scandinavian Codes.
7. Charlemagne the legislator.

#### *(III) Third Period*

8. Law becomes territorial.
9. Period of the Thousand Local Codes—Code of Montpellier.
10. People's law-books, as common law—Mirror of Saxony—Trial by battle—Mirror of Swabia.
11. Courts of lay-judges—Some judgments of the Schoeffen—Oaths and ordeals.
12. Written deeds—Monks as conveyancers.

#### *(IV) Fourth Period*

13. Germanic law transformed by Maritime, Papal, and Romanesque law—The Imperial Chamber of Justice.



XII. 1—A VIKING CHIEFTAIN

## XII

# The Germanic Legal System

### (I) FIRST PERIOD



IN the dim mists of Northern mythology, Odin, the father of the gods, the All-Father, who welcomes the souls of brave men slain in battle, ruled in Valhalla, the Hall of the Slain. Carlyle calls Odin "the type Norseman,—the chief God to all Teutonic peoples". Odin's powerful figure was the cynosure of every clan-chieftain<sup>1</sup> of that mighty Germanic race, which changed the face of Western Europe, slowly but irresistibly, during the thousand years that culminated in Charlemagne's Germanic Empire.

In Norse morality, manly strength was the prime virtue. Death in battle was their hope; a "straw-death", or death in bed, was their dread. The Valkyries, the mighty maidens of Valhalla, watched lovingly over the turmoil of battle, marked with their spears those heroes worthy of death, and conducted them to Valhalla, where they were served with foaming beakers of mead, and received Odin's welcome. Even in Valhalla the souls of Norse heroes amused themselves all day long in fierce combat, hewing each other down for sport; but there, all wounds healed each evening before feast-time in the great hall.

## *XII. Germanic Legal System*

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In Norse morality, retaliation for wrongs received was a duty as well as a right. The gods upheld the stronger hand. Might proved right. "What we take by our arms we keep as our right", was their saying. The Vikings, the sea-rovers of the North, and the Goths, the land-rovers of the East, typified the urge of strong men for hardy adventure and the prizes of victory. The vocation of predatory conquest was an honorable one. They sailed all the known seas. They took booty and left their mark from Greenland and Vineland to Paris, from Spain and Sicily to Constantinople.

Vikings, Goths, Angles, Saxons, Franks—all deploy in the dawn of their careers with a racial belief in crude physical power as the basis of social order.

2. Germanic justice, as it emerges into history, is purely secular.

There was indeed a god or two, called sometimes Thor, sometimes Forsete,—Thor, as god of Law and Order, Forsete, as god of Justice. Forsete<sup>2</sup> lived in a castle, called Glitner, with columns of gold and roof of silver; and there he reconciled all disputes brought before him. Thor dealt out stern justice sitting under the great world-ash-tree, Ygdrasil. Thor's Day—Thursday—was the day for the assemblies to begin; and oaths were sworn in Thor's name. But the god was scarcely more than a symbol.





XII. 2—FORSETE, GOD OF JUSTICE

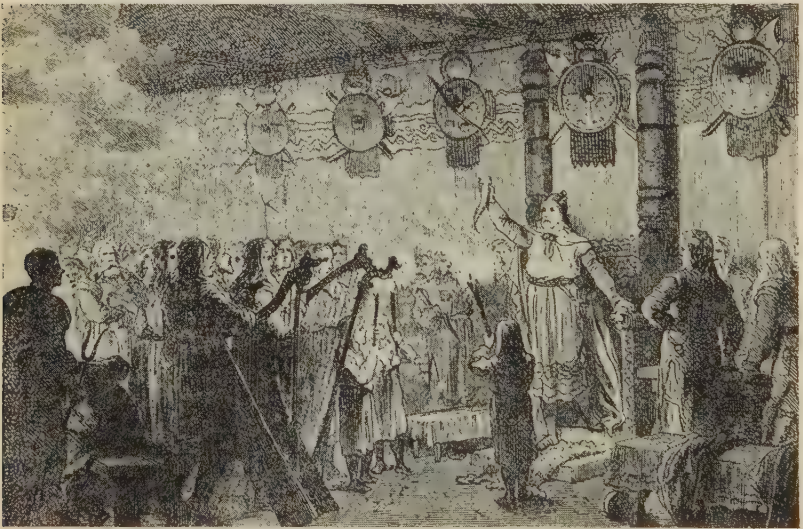
## *XII. Germanic Legal System*

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He had no priests, and he gave no inspired laws, as in Egypt, Babylon, Judea, and India.

Moreover, Germanic justice, as in primitive Greece and Rome, was democratic.

There was, of course, a chief, or earl, of each clan, and the earl's hall was the centre of clan life.<sup>3</sup> There the earl did patriarchal justice among his own family and clansmen, standing on a dais in his spacious hall. For the paternal power of the chieftain and father of the family was as absolute among the Norsemen as among the early Romans. When a child was born, it was shown to the



XII. 3—A NORSE EARL IN HIS HALL

## 2. *Primitive Procedure*



XII. 4—THE HILL OF LAWS

father, who had the power then and there to say that it was fit for bringing up, or to order it ruthlessly exposed to die; this custom persisted in Scandinavia until Christianity was adopted in the 900's.

But the justice of the whole tribe, the settlement of disputes between clans, was done at the assembly of the people, the *Al-ting*, where all the free men, armed, met periodically, by a lunar calendar. The assembly, or *Ting*, in Scandinavia, took place in the open air, in a wooded valley, called *Tingvallir*, near an eminence, called the *Logberg*, or *Hill of Laws*.<sup>4</sup> This Hill of Laws was crowned with a huge pillar, the *Ting-stone*, and surrounded with stone benches for the chiefs and the bards. From this eminence, the voice of the Law-men could be heard afar. These Law-men (later known as Law-speakers) are thus









## *XII. Germanic Legal System*

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described in the oldest Icelandic law-book, the *Grágás*<sup>4a</sup> or *Book of Grey-Gooseskin*:<sup>a</sup>

“A law-court shall we have and hold here every summer at the *Al-ting*. . . . The Law-speaker shall determine who may have a place on the Hill of Laws, and one who without his permission sits there incurs a fine of three marks. . . . The Law-speaker is bound, both here at the *Al-ting* and at home, to say, to any who ask him thereon, what the law commands; but he is not bound any further to give folk advice in their lawsuits. He shall also recite the *Ting* rules of procedure every summer, and all the other law-provisions shall he recite at every period of three summers, in case a majority of the law-court men wish to hearken thereto; the first Friday of the *Ting*-session shall the *Ting* rules of procedure be always recited, in case the law-court men have time to hearken thereto.”

At these Courts on the Hill of Laws, the parties to a dispute, having duly summoned their opponents, pleaded their cause before the assembly.<sup>5</sup> Then one or more of the Law-speakers, venerable or clever men, like *Nyal* or *Snorri*, famed for their knowledge of the technicalities of procedure and of the tribal traditions, propounded a decision; then the assembly, by their shouts, or with clash of sword on shield, approved or disapproved the proposals of the Law-speakers;<sup>6</sup> for, as *Tacitus* tells us<sup>b</sup>, the most esteemed sort of applause was the clash of weapons.

3. In general, in this first Germanic stage, legal justice consisted largely of precise formulas and astute wranglings over procedure; and it served mainly as a

### 3. *An Early Lawsuit*

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XII. 5—A LAWSUIT AT THE TING

useful and at the same time exciting method of securing an interval of peace and rest from the violence of endless clan-feuds. The Saga of Burnt Njal is one continuous alternation of feuds and lawsuits.

A short extract will vividly illustrate the style of litigation.<sup>c</sup> In this case a series of disputes had ended in the siege of the house of Njal by Flosi and his men; the house had been fired, and Njal and his family were burnt to death. Now Njal "was so great a lawyer that his match was not to be found; all that he advised men was sure to be the best for them to do; gentle and generous, he un-

## XII. Germanic Legal System

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raveled every man's knotty point who came to see him about them". And so a great feud arose; but first the kinsfolk sought redress at the Al-ting. At the first meeting, notice of suit is given; at the ensuing one, the suit is heard:

[*The Lawsuit of Mord vs. Flosi.*] "It was one day that men went to the Hill of Laws, and the chiefs were so placed that Asgrim Ellidagrim's son, and Gizur the White, and Gudmund the Powerful, and Snorri the Priest, were on the upper hand by the Hill of Laws; but the Eastfirthers stood down below.

"Mord Valgard's son stood next to Gizur his father-in-law, he was of all men the readiest-tongued.



XII. 6—THE ASSEMBLY CLASHES ITS APPROVAL

### 3. *An Early Lawsuit*

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"Gizur told him that he ought to give notice of the suit for manslaughter, and bade him speak up, so that all might hear him well.

[1] "Then Mord took witness and said, 'I take witness to this, that I give notice of an assault laid down by law against Flosi Thord's son, for that he rushed at Helgi Njal's son and dealt him a brain, or a body, or a marrow wound, which proved a death-wound, and from which Helgi got his death. I say that in this suit he ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I say that all his goods are forfeited, half to me and half to the men of the Quarter, who have a right by law to take his forfeited goods. I give notice of this suit for manslaughter in the Quarter Court into which this suit ought by law to come. I give notice of this lawful notice; I give notice in the hearing of all men on the Hill of Laws; I give notice of this suit to be pleaded this summer, and of full outlawry against Flosi Thord's son; I give notice of a suit which Thorgeir Thorir's son has handed over to me.'

"Then a great shout was uttered at the Hill of Laws; that Mord spoke well and boldly. . . . .

"After that Mord sat him down.

"Flosi listened carefully, but said never a word the while. . . .

"Kari Solmund's son declared his suits against Kol Thorstein's son, and Gunnar Lambi's son, and Grani Gunnar's son, and it was the common talk of men that he spoke wondrous well . . . . .

"After that other men gave notice of their suits, and it was far on in the day that it went on so.

"Then men fared home to their booths.

"Eyjolf Bolverk's son went to his booth with Flosi, they passed east around the booth and Flosi said to Eyjolf, 'See'st thou any defence in these suits?' 'None,' says Eyjolf. 'What counsel is now



## *XII. Germanic Legal System*

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to be taken?' says Flosi. 'I will give thee a piece of advice,' said Eyjolf. 'Now thou shalt hand over thy priesthood to thy brother Thorgeir, but declare that thou hast joined the Ting of Askel the Priest the son of Thorkettle, north away in Reykiardale; but if they do not know this, then may be that this will harm them, for they will be sure to plead their suit in the Eastfirthers' court, but they ought to plead it in the Northlanders' court, and they will overlook that, and it is a Fifth Court matter against them if they plead their suit in another court than that in which they ought, and then we will take that suit up, but not until we have no other choice left.'

. . . . .  
"Now the time passes away till the courts were to go out to try suits. Both sides then made them ready to go thither, and armed them. Each side put war-tokens on their helmets. . . . .

"Now they all came together, and went straight to the court of Eastfirthers. They went to the court from the south, but Flosi and all the Eastfirthers with him went to it from the north. There were also the men of Reykiardale and the Axefirthers with Flosi. There, too, was Eyjolf Bolverk's son. Flosi looked at Eyjolf, and said, 'All now goes fairly, and may be that it will not be far off from thy guess.' 'Keep thy peace about it,' says Eyjolf, 'and then we shall be sure to gain our point.' . . . . .

"Then lots were cast as to the declarations, and he, Mord, drew the lot to declare his suit first.

[2] "Now Mord Valgard's son took witness the second time, and said, 'I take witness to this, that I except all mistakes in words in my pleading, whether they be too many or wrongly spoken, and I claim the right to amend all my words until I have put them into proper lawful shape. I take witness to myself of this.'

"Again Mord said, 'I take witness to this, that I bid Flosi Thord's son, or any other man who has undertaken the defence made over to him by Flosi, to listen for him to my oath, and to my



### 3. *An Early Lawsuit*

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declaration of my suit, and to all the proofs and proceedings which I am about to bring forward against him; I bid him by a lawful bidding before the court, so that the judges may hear it across the court.' . . . . .

"After that he spoke in these words, 'I have called Thoro Thorodd as my first witness, and Thorbjorn as my second; I have called them to bear witness that I gave notice of an assault laid down by law against Flosi Thord's son', . . . . .

[3] "Again Mord Valgard's son took witness. 'I take witness to this,' said he, 'that I bid those nine neighbours whom I summoned when I laid this suit against Flosi Thord's son, to take their seats west on the river-bank, and I call on the defendant to challenge this inquest, I call on him by a lawful bidding before the court so that the judges may hear.' . . . . .

"Now Flosi and his men went thither where the neighbours on the inquest sate. Then Flosi said to his men, 'The sons of Sigfus must know best whether these are the rightful neighbours to the spot who are here summoned.' Kettle of the Mark answered, 'Here is that neighbour who held Mord at the font when he was baptized, but another is his second cousin by kinship.' Then they reckoned up his kinship, and proved it with an oath.

"Then Eyjolf took witness that the inquest should do nothing till it was challenged. A second time Eyjolf took witness, 'I take witness to this,' said he, 'that I challenge both these men out of the inquest, and set them aside'—here he named them by name, and their fathers as well—'for this sake, that one of them is Mord's second cousin by kinship, but the other for gossipry, for which sake it is lawful to challenge a neighbour on the inquest; ye two are for a lawful reason incapable of uttering a finding, for now a lawful challenge has overtaken you, therefore I challenge and set you aside by the rightful custom of pleading at the Al-ting, and by the law of the land; I challenge you in the cause which Flosi Thord's son has handed over to me.'

## *XII. Germanic Legal System*

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"Now all the people spoke out, and said that Mord's suit had come to naught, and all were agreed in this that the defence was better than the prosecution.

"Then Asgrim said to Mord, 'The day is not yet their own, though they think now that they have gained a great step; but now some one shall go to see Thorhall my son, and know what advice he gives us.' Then a trusty messenger was sent to Thorhall, and told him as plainly as he could how far the suit had gone, and how Flosi and his men thought they had brought the finding of the inquest to a deadlock. 'I will so make it out,' says Thorhall, 'that this shall not cause you to lose the suit; and tell them not to believe it, though quirks and quibbles be brought against them, for that wiseacre Eyjolf has now overlooked something. But now thou shalt go back as quickly as thou canst, and say that Mord Valgard's son must go before the court, and take witness that their challenge has come to naught,' and then he told him step by step how they must proceed.

"The messenger came and told them Thorhall's advice.

[4] "Then Mord Valgard's son went to the court and took witness. 'I take witness to this,' said he, 'that I make Eyjolf's challenge void and of none effect; and my ground is, that he challenged them not for their kinship to the true plaintiff, the next of kin, but for their kinship to him who pleaded the suit; I take this witness to myself, and to all those to whom this witness will be of use.' After that he brought that witness before the court. Now he went whither the neighbours sate on the inquest, and bade those to sit down again who had risen up, and said they were rightly called on to share in the finding of the inquest.

"Then all said that Thorhall had done great things, and all thought the prosecution better than the defence.

"Then Flosi said to Eyjolf, 'Thinkest thou that this is good law?' 'I think so, surely,' he says, 'and beyond a doubt we over-

### 3. *An Early Lawsuit*

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looked this; but still we will have another trial of strength with them.'

[5] "Then Eyjolf took witness. 'I take witness to this,' said he, 'that I challenge these two men out of the inquest'—here he named them both—'for that sake that they are lodgers, but not householders; I do not allow you two to sit on the inquest, for now a lawful challenge has overtaken you; I challenge you both and set you aside out of the inquest, by the rightful custom of the Al-ting and by the law of the land.' Now Eyjolf said he was much mistaken if that could be shaken; and then all said that the defence was better than the prosecution.

"Now all men praised Eyjolf, and said there was never a man who could cope with him in lawcraft . . . . .

[6] "Then Mord went to the court and took witness. 'I take witness to this, that I bring to naught Eyjolf Bolverk's son's challenge, for that he has challenged those men out of the inquest who have a lawful right to be there; every man has a right to sit on an inquest of neighbours, who owns three hundreds in land or more, though he may have no dairy-stock; and he too has the same right who lives by dairy-stock worth the same sum, though he leases no land.' Then he brought this witness before the court, and then he went whither the neighbours on the inquest were, and bade them sit down, and said they were rightfully among the inquest.

"Then there was a great shout and cry, and then all men said that Flosi's and Eyjolf's cause was much shaken, and now men were of one mind as to this, that the prosecution was better than the defence.

"Then Flosi said to Eyjolf, 'Can this be law?'

"Eyjolf said he had not wisdom enough to know that for a surety, and then they sent a man to Skapti, the Speaker of the Law, to ask whether it were good law, and he sent them back word that it was surely good law, though few knew it.

## *XII. Germanic Legal System*

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[7] "Then this was told to Flosi, and Eyjolf Bolverk's son asked the sons of Sigfus as to the other neighbours who were summoned thither. They said there were four of them who were wrongly summoned; 'for those sit now at home who were nearer neighbours to the spot.'

"Then Eyjolf took witness that he challenged all those four men out of the inquest, and that he did it with lawful form of challenge . . . . .

"And now it was plain in everything that Flosi and Eyjolf were very boastful; and there was a great cry that now the suit for the burning was quashed, and that again the defence was better than the prosecution.

[8] "Then Asgrim spoke to Mord, 'They know not yet of what to boast ere we have seen my son Thorhall. Njal told me that he had so taught Thorhall law, that he would turn out the best lawyer in Iceland whenever it were put to the proof.' Then a man was sent to Thorhall to tell him how things stood, and of Flosi's and Eyjolf's boasting, and the cry of the people that the suit for the burning was quashed in Mord's hands. 'It will be well for them,' says Thorhall, 'if they get not disgrace from this. Thou shalt go and tell Mord to take witness, and swear an oath, that the greater part of the inquest is rightly summoned'. . . . . Then Mord went to the court, and took witness, and swore an oath that the greater part of the inquest was rightly summoned'. . . . .

"Then there was a great roar that Mord handled the suit well; but it was said that Flosi and his men betook them only to quibbling and wrong.

"Flosi asked Eyjolf if this could be good law, but he said he could not surely tell, but said the Lawman must settle this knotty point.

### 3. *An Early Lawsuit*

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"Then Thorkel Geiti's son went on their behalf to tell the Law-man how things stood, and asked whether this were good law that Mord had said.

"'More men are great lawyers now,' says Skapti, 'than I thought. I must tell thee, then, that this is such good law in all points, that there is not a word to say against it; but still I thought that I alone would know this, now that Njal was dead, for he was the only man I ever knew who knew it.'

"Then Thorkel went back to Flosi and Eyjolf, and said that this was good law. . . . .

[9] "Then the neighbours on Mord's inquest went to the court, and one uttered their finding, but all confirmed it by their consent; and they spoke thus, word for word, 'Mord Valgard's son summoned nine of us thanes on this inquest, but here we stand five of us, but four have been challenged and set aside, and now witness has been borne as to the absence of the four who ought to have uttered this finding along with us, and now we are bound by law to utter our finding. . . . . And now we have all sworn an oath, and found our lawful finding, and are all agreed, and we utter our finding against Flosi, and we say that he is truly guilty in this suit. We nine men on this inquest of neighbours so shapen, utter this our finding before the Eastfirthers' Court over the head of John, as Mord summoned us to do; but this is the finding of all of us.'"

Nearly two thousand years have passed since Tacitus described the Germanic assembly, and one thousand years since Iceland was settled. But the ancient place of Iceland's assembly is still known and venerated;<sup>7</sup> and in June, 1921, when Iceland had once more become independent, and the King of Denmark and Iceland came to grace the national celebration, he was saluted by a blare



## *XII. Germanic Legal System*

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XII. 7—VIEW OF TINGVALLIR TODAY IN ICELAND  
This is the Hill of Laws, the meeting-place of Germanics  
for a thousand years past

of trumpets as he solemnly ascended the ancient Hill of Laws in the Tingvallir. And in the English Isle of Man (which is still locally independent of the British Parliament, though it lies close in sight of every tourist who steams into Liverpool), all Manx laws must still be proclaimed from the Tynwald Hill;<sup>s</sup> and on July 5 of every year the senior Deemster, or Judge, solemnly reads them aloud from the summit. For the name Tynwald, now borne by the supreme local assembly, is none other than Tingvallir, the old Norse name for the wooded valley of

#### 4. *Stage of Unwritten Law*

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the assembly; and the popular branch of this Manx Legislature is still known as the House of Keys, that is, the men who have the keys of the law in their bosom,—the old Norse Law-speakers.

4. There were plenty of lawsuits in the old Norse days. But what law there was, rested in tradition only,—that is, in the memory of the Law-speakers. The primitive Germanics had no written laws; they had not even writing. They had somewhere borrowed or invented a



XII. 8—READING THE LAWS FROM THE TYNWALD

This hill perpetuates in the Isle of Man the tradition of the old Norse Hill of Laws, once known as the Tingvallir, whence laws are proclaimed

## *XII. Germanic Legal System*

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crude form of symbols, called "futhorc", or runes.<sup>9</sup> But the meaning of the runes was known only to the leaders; and they were used chiefly for brief inscriptions, on burial stones or on weapons, and in no sense served for literature or records.

But in the second Germanic period we find them everywhere reducing their tribal customs to writing. The Germanic legal system falls into four stages:

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CHART OF GERMANIC PERIODS

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| Date                 | Stages of Process                           | Form of Law                               |
|----------------------|---------------------------------------------|-------------------------------------------|
| — B. C.<br>A. D. 200 | PRIMITIVE LOCATION<br>in the North and East | ORAL TRADITIONS                           |
| A. D. 300            | THE MIGRATIONS<br>South and West<br>and     | TRIBAL CODES<br>put into writing          |
| A. D. 800            | THE NEW SETTLEMENTS                         |                                           |
| A. D. 900            | THE FUSION OF RACES<br>and                  | LAW-BOOKS<br>of<br>LOCAL CUSTOMARY<br>LAW |
| A. D. 1400           | THE LOCALIZATION OF LAW                     |                                           |
| A. D. 1500           | POLITICAL NATIONALIZATION                   | ROMAN LAW-BOOKS<br>as<br>COMMON LAW       |

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## 5. *Stage of Codified Customs*

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XII. 9—A RUNIC INSCRIPTION

The runes may be seen cut into the face of the upright burial-stone

### (II) SECOND PERIOD

First was that pre-historic period, just described, when they stayed in their northern and eastern homes.

5. Next comes their long period of migration south and west. For centuries the Goths of the east had been making booty-excursions into Roman regions. But about A. D. 300 and extending to A. D. 700, the entire race, retiring before the repeated invasions of fierce Asiatic hordes, migrated west and south, in a series of great treks, into what is now Germany, France, Netherlands,





XII. 10—MAP OF GERMANIC MIGRATIONS

The winding lines show the paths of the several Germanic peoples as they progressed during their centuries-long treks from the North and East to the South and West



## 5. *Stage of Tribal Codes*

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Belgium, England, Scotland, Switzerland, Spain, Portugal, and Italy.<sup>10</sup> There were a dozen different large tribes of them, and we can trace them moving through four centuries—often doubling on their paths, but gradually mastering the entire Romanized regions; at one time plundering, ravaging, and retreating, at another time forcibly occupying, or demanding of the Roman emperors, lands whereon to settle.<sup>11</sup> They intermarried with the original Romanized Kelts, absorbing or absorbed into Roman civilization.

Here they met a softer climate, an easier subsistence, an intellectual religion, and a literature. They now displaced Roman rule, establishing their own political system, and preserving their own legal traditions. By the



XII. 11—GERMANICS SEEKING A SETTLEMENT

## *XII. Germanic Legal System*

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XII. 12—MAP OF GERMANIC SWAY

time of Charlemagne, A. D. 800, Western Europe was one Germanic empire.<sup>12</sup> In Spain, Northern Italy, and Southern France, a greater element of Roman institutions of course persisted locally. But the general method of government was Germanic.

The two peculiar features of this stage were, first, that the Germanic law now became “personal”, so-called; and,





## 5. *Stage of Tribal Codes*

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secondly, that it was now put into writing. It was personal, because each of the newly settled tribes, however mingled locally, continued to live by its own tribal law, and at the same time the original Romanized inhabitants were allowed (for a while) to live by their Roman law. And the Germanic laws were put into writing, because the Germanic settlers now first came into contact with a literature, and first felt the need of clearly formulating their own customs.

6. The Lex Salica, or Code of the Salic Franks, about A. D. 500, is the first of a series of a dozen such Germanic tribal codes, officially compiled by royal order.<sup>13</sup> One of the best MSS. is at the monastery of St. Gall. The first page of the code reads:<sup>d</sup>

[*The Lex Salica.*] "In the name of our Lord Jesus Christ, here begin the Titles of the Salic Code.

### *Title I. Summons to Court*

"If any one is summoned to the court according to the law of the land and comes not, and no excuse detains him, he shall be condemned to a fine of fifteen shillings.

"But he who summons another man and comes not himself, and no excuse detains him, shall pay fifteen shillings to the party summoned. . . .

### *Title II. Theft of Swine*

"If any one steals a sucking pig from the stall, and it is proved on him, he shall be condemned to a fine of three shillings.



## *XII. Germanic Legal System*

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“If any one steals a pig who could live without its mother, and it is proved on him, he shall be condemned to a fine of one shilling, . . . . If any one steals a two-year pig, he shall be condemned in a fine of fifteen shillings, . . . . .”

It will be noticed that the primitive Salic Code begins almost exactly like the Roman Twelve Tables (*ante*, Chap. VII), i. e. with a rule for summons to the court or assembly; which suggests that the stage of legal ideas here represented was about the same as that of the primitive Romans one thousand years before, though the Salic Code is not even so well arranged as the Roman one. (Lawyers will also note with interest that the word for “excuse”, in Title One, is “sunna”, which is the same word as “essoins”, in early English law-books; the rules for “essoins” of men summoned to jury or court duty form a large part of the earliest law in Bracton’s book. This serves to illustrate the common racial bond between English law and Germanic law in general.)

The Code, or Edict, of the Lombards<sup>14</sup>, about A. D. 650, who finally settled in Northern Italy, was the nearest of kin to that of the Saxons, who settled in England; and, strangely enough, the potent modern idea of a trust, in Anglican law, has been traced to a peculiar expedient first seen in Lombard law. Lanfranc, the prime minister of William the Conqueror (*post*, Chap. XVI), was by birth a Lombard, who in his youth was recorded in the



XII. 14—THE LOMBARD CODE OF ROTHAR

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XII. 16—FIRST GOTHIC CHIEF  
JUSTICIAR OF SPAIN

Lombard chronicles as a famous scholar in that law; and it was probably that early learning which enabled him later to grasp readily the related Saxon law, and gained him equal fame in England in some notable lawsuits over the church's rights on Saxon soil.

In Spain, by the second century of West-Gothic rule, about A. D. 650, the laws of the two peoples, Goths and Romans, were amalgamated in a single compilation, the *Forum Judicum*, or (in Spanish) *Fuero Juzgo*.<sup>15</sup> The *Fuero Juzgo* continued to be quoted in Spanish courts into the 1800's, and it was once law in the states of Louisiana, Texas, and California. In the city of Burgos is still shown to the traveler the rude chair of Justice in which sat the first Chief Justiciar under the Gothic dynasty, A. D. 700, as well as a statue of this legendary personage.<sup>16</sup>

In Scandinavia, which was isolated from contact with Romanized civilization, and did not become Christianized



XII. 15—THE FUERO JUZGO

This was the code fusing the customs of the Goths with Roman law in Spain. This manuscript is in the Royal Library at Madrid





XII. 18—CHARLEMAGNE AT HIS SCHOOL OF THE PALACE  
He instituted the first official system of education for his people



## 6. *Early Codes of Customs*

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until the tenth century, this phase of reducing the laws to writing did not arrive till about A. D. 1100. But in that century the Gulathing Code was framed for a part of Norway;<sup>17</sup> and this was only one of a copious series of Scandinavian codes formulated in the next two centuries.

But for all the other Germanic peoples the culmination of this second period of Germanic law, the period of the written codes, had come about A. D. 800.

7. This date finds Charlemagne master of the Germanic world,—a great organizer and civilizer, instituting the first official system of written education for his people in their new life,<sup>18</sup> revising the earlier codes of the various peoples under him, and adapting the old democratic popular assembly to the difficult role of a council or parliament in what was now a royal autocracy. Charlemagne's parliament still met in the open air, in old Germanic style. One of Charlemagne's first parliamentary decrees, called capitularies, established a system of sending his personal envoys on circuit to inspect the course of justice, "ad justitias faciendas"; and this method of his served later to develop the Anglican institution of trial by jury.<sup>19</sup>

### (III) THIRD PERIOD

8. The third Germanic stage, from about A. D. 800 to 1400, thus finds the people settled as agriculturists, and a great change gradually takes place. To live together

er eigi i man landt. æða þra þallenn. þa scolo  
 aller menn þingat kornat þeirra umræða  
 þeim er skilt. <sup>11. og er þar skilt. 100 þetta</sup>  
**O**tt er um þynest. ær þer hagnum þund  
 þar i mæltan ær þyrt her i gula. þra  
 mænger þinga menn sein uerom þer sat  
 tera. <sup>11. og er þar skilt. 100 þetta</sup> þat ero sextigur or hordæ þylki.  
 þu ian mænger or rýgið þylki. <sup>ætt</sup> þu ian mænger  
 or þirðæ þylki. <sup>11. og er þar skilt. 100 þetta</sup> þu ian mænger or rýgið  
 þylki. <sup>ætt</sup> þu ian mænger or rýgið þylki. <sup>ætt</sup> þu ian mænger  
 na. þa sein i logum er mælt. en ær þu ian mænger  
<sup>ætt</sup> XII. bændr. <sup>ætt</sup> ut þeir lendar menn scolo  
 eptir þara i egða þylki. tveir i rýgið þylki.  
 einn a lundhordlande. einn i þirðæ þylki. <sup>ætt</sup> þu  
 a lundhordlande til þess ær gæta hivila mauna  
 þu i þiopin oc rans monnom. <sup>ætt</sup> n lendar  
 menn aller ædrer. <sup>ætt</sup> er i man ero laga  
 þara scolo þara til logþingis or þeima. þu  
 þylki. uenianaid þu konongs gange þu i  
 æða lialþra þeirra. <sup>ætt</sup> oc mæsto þrestar þeir er



XII. 19—CHARLEMAGNE ISSUING HIS FIRST CAPITULARY

One of his earliest decrees sent envoys on circuit to inspect  
the course of justice, and this led ultimately  
to the Norman trial by jury

## *XII. Germanic Legal System*

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selves in the presence of a thousand local law-books. A map may attempt to suggest the strange territorial mosaic, in each fragment of which some separate body of law, smaller or larger, was in force.<sup>21</sup> Each feudal lord had the power of justice: the powers differed only in degree,—the high, the middle, and the low (as the phrase ran); the high justice alone having the power to impose the death penalty. In the words of one of the local books of customary law: “The baron has all manner of jurisdiction in his territory, and the king cannot proclaim his command in the baron’s land without the baron’s consent”.

Each region therefore administered, developed, and recorded its own local laws and customs independently, in local codes. We may, to illustrate, juxtapose pages from four samples of such local codes, all in the period of the 1200’s,—Harlem, in Holland; Montpellier, in France; Teruel, in Spain; and Dax, in Béarn in Gascony;<sup>22</sup> this customary code of Béarn was the earliest written one in France (though then and for three ensuing centuries Gascony was held by the English crown). Here are some passages illustrative of the style of “*Las Costumas e las Franquesas de Montpeylher*”; there were 123 sections in all.<sup>23</sup>



XII. 21—MAP OF THE MOSAIC OF JURISDICTIONS





## 9. *Period of Local Law-Books*

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[*The Custumal of Montpellier.*] "III. When men come to law-suits, they make oath denying fraud or malice; the court asks each party on oath whether to the seneschal or the judge or any of the jurors for that suit he has given or promised money. . . .

"VIII. In court a jurist may not be heard to argue, except in a case of his own; and if he argues in his own case, a jurist may argue against him. Nor may advocates be heard, unless the parties consent. In deliberations the prince may have jurists if he wishes; but in lawsuits he must have always a judge. . . .

"XIII. A father who marries off a daughter endowed with property or honor, or endows her with property or honor, such daughters cannot afterwards demand anything of the paternal estate, unless the father allows it to them. And if the father has besides one son and one daughter not endowed nor married, and the father dies intestate, the goods of the father go to the son and the daughter not married or endowed. And if one of the married or endowed daughters dies without will and without heirs, her goods go equally between all the brothers and sisters surviving, the father being dead. And if the son or the daughter not married nor endowed die without will and without children, their goods go to the other and his or her children. And if both die without will and without children, their goods go to the married daughters and their heirs. But every person may make a will in his own right.—And the same rule we declare for maternal property. . . .

"XXI. If any one buys from a thief or a non-owner anything stolen or converted or put up at public auction, thinking it in good faith to belong to him who sells, and if afterwards the owner comes and proves property, then the buyer makes oath that he knew it not to be stolen or not owned and that he cannot produce the seller, and then the owner of the thing restores to the buyer only the amount paid for it and recovers the thing. . . .

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"XXVI. One lawful and competent and reputable witness is believed in suits for movables up to one hundred shillings.

"XXVII. Two lawful and competent witnesses are believed in all cases."

There were literally a thousand of these local law-books,—some three hundred of them in France, as many hundreds in Italy, another hundred or two in Spain, hundreds in Netherlands and Germany and England. Each duchy or principality, each barony, each manor, each town, almost each village, had its own book of law. More than this, each separate class of the community might have its separate body of rules,—clergy, nobles, peasants, townspeople, merchants, artisans.

In any one of the hundreds of local baronial jurisdictions, the every-day course of penal justice may be gathered from the following pen-picture, by a modern scholar who ably combined the knowledge of the historian with the art of the novelist:<sup>h</sup>

[*A Day's Justice in the Barony of St. Aliquis, A. D. 1220:*] "The barons of St. Aliquis acted very nearly like sovereign princes. They, of course, had their own gallows with power of life and death, and even coined a little ill-shapen money with their own superscription. . . . One of the great duties of a high seigneur is to render justice. It is for that (say learned men) that God grants to him power over thousands of villeins and the right to obedience from nobles of the lower class. Indeed it can be written most

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properly that a good baron 'is bound to hear and determine the cause and pleas of his subjects, to ordain to every man his own, to put forth his shield of righteousness to defend the innocent against evildoers and deliver small children and such as be orphans and widows from those that do overset them. He pursues robbers, raiders, thieves, and other evildoers. For this name "lord" is a name of peace and surety.' . . . . .

"The best of barons only measurably live up to this high standard. Yet Baron Conon of St. Aliquis is not wholly exceptional in telling himself that a reputation for enforcing justice is in the end a surer glory than all the fetes around St. Aliquis. . . . .

"The laws enforced in the St. Aliquis region are the old customary laws in use ever since the Frankish barbarians' invasions. Many of these laws have never been reduced to writing—at least for local purposes—but sage men know them. There are no professional jurists in the barony. Sire Eustace, the seneschal, understands the regional law better than any other layman around the castle, though he in turn is surpassed by Father Gregoire. The latter has, indeed, a certain knowledge of the Canon law of the Church, far more elaborate than any local territorial system, and he has even turned over the leaves of voluminous parchments of the old Roman law codified by the mighty Emperor Justinian. Up at Paris, round the king there are now trained lawyers, splitters of fine hairs, who say that this Roman law is far more desirable than any local 'customary law', and they are even endeavoring (as the king extends his power) to make the Code of Justinian the basis for the entire law of France. But conditions on most baronies are still pretty simple, the questions to be settled call merely for common sense and a real love of fair play on the part of the judges. One can live prosperously and die piously under rough-and-ready laws administered with great informality.

"Conon has 'high justice' over his vassals and peasants. This means absolute power of life and death over any non-noble on the



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seigneurie,—unless, indeed the baron should outrage merchants bound to a privileged free city, or some other wayfarers under the specific protection of the king or the Duke of Quelquepart. If strange noblemen get into trouble, it will depend on circumstances whether Conon undertakes to handle their cases himself, or refers them to his suzerain, the duke. The right of seigneurs to powers of justice on their own lands even over high nobles is, however, tenaciously affirmed, and it is only with difficulty that the duke and, above him, the king can get some cases remitted to their tribunals. If, however, the alleged offender is a monk, he will be handed over to the local abbot or, if a priest, to the bishop of Pontdebois to be dealt with according to the law of the Church.

“Even the lesser sires have ‘low justice’ with the privilege of clapping villeins in the stocks, flogging, and imprisoning for a considerable time for minor offenses; and robbers caught on their lands in the act of crime can be executed summarily. But serious cases have to go to the court of the baron as high justiciar, as well as all the petty cases which have arisen on the lord’s personal dominions. If the litigants are peasants, the wheels of justice move very rapidly. There is a decided absence of formalities.

“A great many disputes go before the provost’s court, presided over by Sire Macaire, a knight of the least exalted class, who is Conon’s ‘first provost’. . . . One of Sire Macaire’s main duties is to chase down offenders, acting as a kind of sheriff, and after that to try them. . . . Small penalties are handed down every day, but more serious matters must wait for those intervals when Messire Conon calls his noble vassals to his ‘plaids’ or ‘assizes’. Every fief-holder is expected to come and to give his lord good counsel as to what ought to be done, especially if any of the litigants are noble. . . .

“However, most St. Aliquis cases concern not the nobles, but only villeins, and with these (thanks be to Heaven!) short shrifts are permitted. The provost can handle the run of crimes when the



## 9. *Period of Local Law-Books*

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baron is busy; but a good seigneur acts as his own judge if possible. Even during the festival period it is needful for Conon to put aside his pleasures one morning to mount the seat of justice. In winter-time the tribunal is, of course, in the great hall, but in such glorious weather a big shade tree in the garden is far preferable. Here the baron occupies a high chair. Sire Eustace sits on a stool at his right, Sire André and another vassal at his left as 'assessors', for no wise lord acts without council. Father Grégoire stands near by, ready to administer oaths on the box of relics; Sire Macaire, the provost, brings up the litigants and acts as a kind of state attorney.

"For the most part it is a sordid, commonplace business. Two villeins dispute the ownership of a yoke of oxen. A peddler from Pontdebois demands payment from a well-to-do farmer for some linen. An old man is resisting the demands of his eldest son that he be put under guardianship: the younger children say that their brother really covets the farm. If the court's decisions are not so wise as Solomon's, they are speedy and probably represent substantial justice.

"But there is more serious business in hand. The news of the fetes of St. Aliquis has been bruited abroad. All the evil spirits of the region have discovered their chance. Certain discharged mercenary soldiers have actually invaded a village, stolen the peasants' corn, pigs, and chickens, insulted their women and crowned their deeds by firing many cottages and setting upon three jongleurs bound for the tourney. They were in the very act of robbing them to their skin when a party of the provost's men, coming up, managed to seize two of these sturdy rascals. . . . They keep a sullen silence and refuse to betray the lair of their comrades who have escaped. The provost intimates that they may be halegrins, and outlaws of the foulest type, said to violate tombs and devour human flesh. . . . Such fellows are, of course, food for the crows, but they must not be allowed to get out

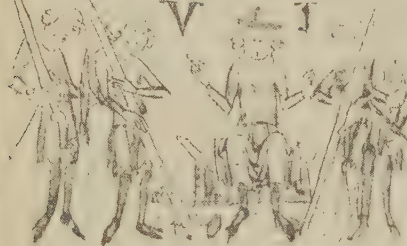
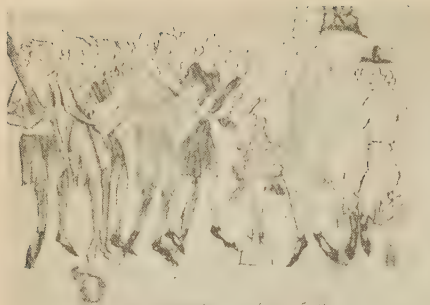
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of life too easily. 'Let the baron command preparatory torture?' suggests Sire Macaire, with a sinister smile. Conon nods. The two beastlike wretches groan and strain at their fetters. Preparatory torture, they know well, is inflicted both to get a confession of guilt and also to extort details about accomplices. . . . The miserable pair are not long uncertain about their fate. They have told the truth about the lair of their comrades. The provost's band surprises the spot. Six hardened rogues, in the very act of counting their plunder, are overpowered. But why weary Messire the Baron with the empty form of trying these robbers when there is no mortal doubt of their guilt and no new information is to be extracted from them? Their throats are therefore cut as unceremoniously as the cook's boy attends to pigeons. The next day, wholly casually, Sire Macaire reports his good success to his lord, and remarks, 'I presume, fair Sire, that Denis can hang the two he has in the dungeon.' Conon (just arranging a hawking party) rejoins: 'As soon as the chaplain can shrive them.' Why, again, should the prisoners complain? They are certainly allowed to prepare decently for the next world, a favor entirely denied their comrades.

· "If there had been any real doubt as to the guilt of the two bandits, they might in desperation have tried to clear themselves by ordeal. If they could have picked a stone out of a caldron of boiling water, lifted and carried a red-hot iron, or even partaken of the Holy Sacrament (first calling on God to strike them dead if they were guilty), and after such a test seemed none the worse, they might have had some claim to go free. Ordeals are an old Germanic usage. They seem to refer the decision to all-seeing God. But ever since Charlemagne's day they have been falling into disfavor. Great churchmen are ordinarily too intelligent to encourage them. Men learned in the law say that often they wrest justice. Brave knights declare the only ordeal worth having is a duel between two champions. . . .





matage is en weire er begoude d'richt sal oñ  
 vldagē etms schulds vil etms swertes arme dē  
 mā dā schulds ab hes bedarf. Ez iñhes  
 mā g' oñ etm mā sine magē beweten ab s'p  
 brent sine magē sin alts das hes selb s'benre  
 gewē uf den heichge das si alts māe magē sin  
 das si durch recht nist en s'anne vedut s'ln  
 er richt sal weine boren gebu ir s'chidem  
 di da verthm s'ln das si seent das mā si gen  
 noch rechtir gewonheit leor vil l'nt d'ng  
 nuigt si an s'ln alts vil als si wollen. houbt  
 vñ vūter vorut s'ln en bloz sin an den heide  
 en s'ln si nicht wēne d'inne l'nnachen habn  
 en bloz swert mer hant vñ etms vūne genant  
 oō zwer das d'ron urt loze emen swereln  
 schult mō andō hant da nist wēne holz vūte  
 wōt nune s'c ane di p'helet. di nūis wol s'rm  
 sm emē wt ane erule vñ d'c gane. Vñ sal  
 mā em k'rtze geburen bi em hofte. das si  
 mūnāt en t'ce an urne hantp'f s'ichidem  
 sal d'richt etms mā gebu d'c sine boim an  
 ge d' en s'ln si nist d'c w'ce. w'ce ad ir em  
 velst das he c'p h'nt vñ d'c w'ce oō al he  
 gewōndt w'nt. oō s'c boimnes g'rt d'c s'clen  
 en nūis he nist cōn he en habes v'clap w'c  
 richter noch ane das arme h'nt v'clap g'  
 boren is so s'ln si d'c k'rtzes zu r'cht g'rt  
 c'p sal en d'richt s'clen d'c d'nt vñ c'p  
 swert s'clen s'ln si ab b'nden si en habes  
 arme v'clap w'c etms richt. d'c d'c richt  
 s'ln si b'ndt g'rt g'rt gen vñ swert d'c etms  
 das di schult war si da he en v'nnie bedarf

# XII. 23—THE MIRROR OF SAXONY

This popular law-treatise recorded the common customary  
 law of a wide Germanic region

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“Naturally many petty offenses do not deserve death. The criminals are usually too poor to pay fines, and it is a waste of honest folk’s bread to let them spend set terms in prison. For small misdemeanants it is often enough to drive the rascals around the neighboring villages in a cart, calling out their names amid hootings and showers of offal. But in the village beyond the Claire is located the pillory for a large class of rogues. . . . .

“But if a villein has committed a great crime, he were best dismissed from an overtroubled world. Dead men never bother the provost twice. All over France you will find a gallows almost as common a sight in the landscape as a castle, an abbey, or a village. Many a fine spreading tree by the roadway has a skeleton be-dangling from one of its limbs. It is a lucky family of peasants which has not had some member thereof hanged, and even then plenty of rogues will die in their beds. Considering the general wickedness abroad, it seems as if there were a perpetual race between the criminals and the hangmen, with the criminals well to the fore.”

It was an era of extreme localism in law. Except for a few royal decrees, there was no common national law.

10. The only element of common law was supplied by a few popular treatises, often called Mirrors. The Mirror of Saxony was written by Eike von Repkow, one of the “schoeffen” or lay-judges. In the Dresden MS. the margin was illuminated with crude pictures, suited to the text, on every page.<sup>23</sup> The page here quoted prescribes the method of settling disputes by a legal duel,—trial by battle, in technical English; that “monstrous birth of



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ferocity and superstition", Hallam calls it. The following text gives a part of the detailed rules:<sup>1</sup>

[*The Mirror of Saxony*.] "The judge shall give two agents to each party, who shall see that they are fitted out as custom directs. Leather and linen they may put on as much as they wish. Head and feet shall be bare. On the hand they shall have only thin gloves. A naked sword in one hand, and one or two more swords girt at the waist, if they wish. In the other hand, a round shield made only of wood and leather, except the buckle, which may be of iron. And lastly they wear a cloak without sleeves over their outfit. Then for the place of combat a peace-ban is proclaimed on penalty of death, so that none may meddle in the duel. To each the judge assigns a man who bears a pole at the boundary of the combat-place; he shall not meddle with the combatants, except if one falls (then he thrusts his pole between them), or if one is wounded or asks for the spear (but this he cannot do without the judge's consent). As soon as the peace-ban is proclaimed, then the duel is to be fought out according to rules, as guaranteed by the judge. When the judge gives the signal to draw the sword, each shall draw the iron from the sheath. They shall both go before the judge, fitted out as they are, and swear,—the plaintiff, that the charge is true, with which he has charged the defendant; the defendant, that he is guiltless, and may God help him in the fight. The sun shall be equally shared by both, as they go towards each other. . . . If the defendant is defeated, judgment shall be against him. If he wins the fight, he shall go free and take the amount deposited for forfeit and penalty."

These treatises purported to record the general rules common to some large region. In the 1200's there were three or four such treatises in French, and three or four in German.

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The Mirror of Saxony was followed by a similar treatise, in German, the Mirror of Swabia.<sup>24</sup> The following passage deals with the mode of electing a king.<sup>j</sup>

*"How they choose the king. CXXII.*

[*The Mirror of Swabia.*] "When they want to choose a king, they must do it at Frankfurt. And if the men do not let the princes into the town, then they may rightly choose him without the town. And when they choose the king, he must give warning to the men who are within the town before he goes forth from the town. . . .

*"Who chooses the king. CXXIII.*

"The king must be chosen by three papal princes and four lay princes.

"The bishop of Mainz is chancellor of the German country; he has the first voice in the choice . . . .

"Among the laymen the first voice in choice is the Palgrave of the Rhine. . . . .

"These four must be German men by father and by mother or by one of the two."

These passages illustrate the still crude and concrete legal style of the Germanic law-books in this period; and all of these books were of the same type.

11. But they became widely popular; in fact, they were known as the "people's law-books", for they were used by the people. The giving of judgment was still universally the business of the people. In every local court the baron, or seneschal, or sheriff, might preside; but the lay-judges sat with him, to voice the sentiment of

**D**az ander ober sin e wip lat.

**D**az dritte ob er gotshüser zer  
höret. Daz rehte hat er so er irken  
für gewihtet wirt vnd nit er an vor  
einem bischof in oder einem andern  
er sol es aber bi dem ersten klagen  
dem phallent grafen. Der sol sine  
erzbischof klagen vnd der mag  
in mit rehte bannen.

Wie man den künig erwilet. **Exij.**

**A**ls man einen künig erwelen  
wil daz sol man tun ze frankē  
furth vnd lat man die hirschen nit in  
die stat so inigen si in mit rechte  
wol erwelen vor der stat. Vnd als si  
den künig kiesen so sol er die lute  
die da inne sint ze achte nū e das  
er von der stat var. Vnd als si sechs  
wuchen in der acht sint gewesen  
so sol si der bischof von inengen ze  
banne nū. Als si dar inne sint sechs  
wuchen vnd einen tag so sullen si  
mit rechte alle bischoffe ze banne tū  
vnd wil der künig er mag si brunge  
in des babstes pan.

Wer den künig erwilet. **Exij.**

**D**en künig sullen erwelen dri  
phaffen hirschen vnd vier lē  
hirschen. Der bischof von inengen  
ist kanzler ze tūtschen lande der  
hat die ersten stamme an der wal.

**D**er bischof von triere die andi

**D**er bischof von köln die dritze

**V**nder den lēzen ist d' erst zwelf  
an der stamme der phallent grafen  
vorn rine des richen truchseze der  
sol den künig die ersten schützlon

für tragen. Der ander an der  
stamme ist der hertzog von sachsen  
des richen markschaltz der sol den  
künige sin spert tragen. **D**er  
bischof von köln der ist kanzler  
ze lamparten. Der von triere d'  
ist kanzler zu dem künigrich ze arle.  
Daz sint dri auge die hant zu der  
kint. **D**er dritte ist d' markgra  
ue von brandenburg des richen  
kammerer der sol den künige mass  
geten. **D**er vierde ist der hertzog  
von porren des richen schenke der  
sol den künige den ersten beher  
tragen. **D**ie vier sullen stesche  
man sin von vatter vnd von mut  
oder von cunwone. Vnd werne si  
in erwelen so sullen si ein sprache  
gebieten hin ze frankenfurth die  
sullen gebieten dem bischof von  
inengen bi dem panne vnd sol si  
der phallent grafen vom rine gebie  
ten bi der acht si sullen dar gebie  
ten zu dem gespreche ir gefellen  
die mit in da welen sullen dar na  
ch den andi hirschen als vil si ir ge  
halten inigen. Da von ist der für  
sten ungerade geleset ob dri an ein  
geualent vier an den andi das  
die drey den vierten sullen volgen  
vnd ir sol die muere volge der muere  
volge volgen daz ist an all kein rehte.  
**E** si die hirschen erwelen. **Exxij.**  
**E** si die hirschen erwelen so  
sullen si uf den heiligen ston  
daz si durch lute noch durch leide  
noch durch gutes unere das inge

XII. 24—THE MIRROR OF SWABIA

The passages quoted are in the left column: "Als man einen künig erwelen wil, daz sol man tun ze frankenfurth", etc.

## 11. *Schoeffen-Courts*

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popular justice. Here, as formerly at Athens and at Rome, the more primitive custom of doing justice, by the votes of all freemen in the assembly, had become impracticable and had suffered a like evolution. The court was now formed by a small number of freemen representing the entire body. These lay-judges were called "doomsmen" (sometimes) or "jurors" in English, "schoeffen" in German, "échevins" in French, "scabini" in Latin. They were the most respectable men of the people, and under Charlemagne they represented a permanent select list.

It was they, and not the presiding baron, who declared what custom required, and who pronounced the judgment, both on law and fact. "In the mediæval Germanic conception, the whole body of the law has latent existence in the consciousness of the people. The judgment thus found, it is the duty of the judgment-finder to declare aloud in the form of an answer to the judge. 'Lord Judge', he says, 'wilt thou hear the law?' And the judge says, 'Yea'. Then says the other, 'I find thee for law that, etc.' . . . The judgment, when assented to by all the judgment-finders, or by a majority of them, takes the name of 'collective judgment'. . . . The judge then vests it with the property of a binding legal command."<sup>k</sup>





*Chronik v Bohemia*

*C. Dreyer*

*Stände v Chancig*

XII. 25—TRIAL COURT IN SESSION AT PRAG, A. D. 1536  
The baron or seneschal or sheriff might preside; but the lay-judges  
sat with him and rendered the judgment



## 11. Schoeffen-Courts

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This distinctive feature of the Germanic court,<sup>25</sup> and the general style of these schoeffen-judgments, are illustrated in the following passages,—the first from the Leitmeritz Court, about A. D. 1375, and the last two from the Magdeburg Court, about A. D. 1300-1330<sup>1</sup>. (It would be profitable to compare these crude and untechnical records with the English year-books of the same period (*post*, Chap. XVI); the schoeffen-records resemble rather those of the lower English courts.)

[*Records of the Schoeffen Court.*] [*Schoeffen-Judgment*, No. 5:] "Greetings. Your question in law is this: 'It happened that a child came into a duly held court with his next friends and would choose a guardian for his property. Then we spoke to the friends of the said child asking whether it had come to its full age and how old it might be, that we might pronounce a judgment thereon. They said that he had his full age and is fully competent to choose a guardian for his property, but would not tell us the number of his years, and therefore we pray your wisdom to speak a judgment, as to how old in years a child must be in order to be competent—which we, ourselves, do not know'. Hereupon, we, Schoeffen at Leitmeritz, speak a judgment. Every child, whether boy or maiden, when it has come through its twelfth year, has become competent in point of days and years. This is the judgment according to law."

[*Schoeffen-Judgment*, No. 2:] "Herman had six farms; three of the six he sold to one called Conrad, as they lay on village and field, which the said Herman should plough, sow, and till; and this is what the said Conrad complained, of Herman and his mother, namely, that he had sold him three farms which should be as long and as broad as the neighboring farms above and below; and therein lies the breach, and he asks judgment. Here answers Herman and

## *XII. Germanic Legal System*

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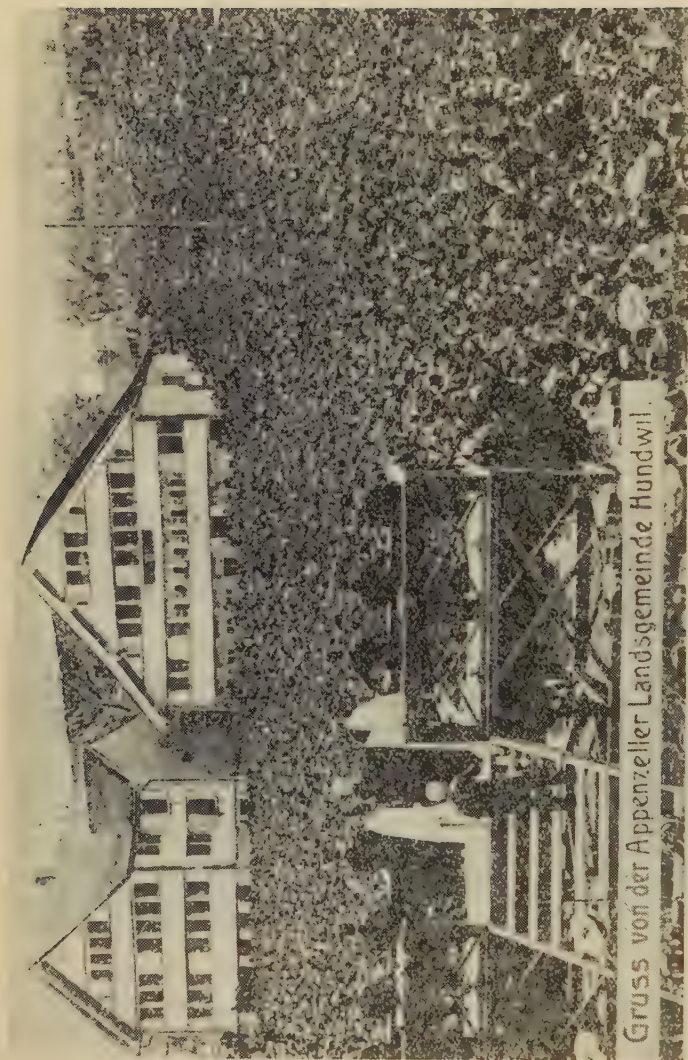
acknowledges that he sold to Conrad three farms as they lay on village and field; but Conrad visited the farms and took them as they were without measurement; and Herman asks judgment. Hereupon, etc. Now, since Herman of his six farms sold three to Conrad as they lay on village and field, and Herman still holds the said farms in his possession on Conrad's account, for plowing and tilling and sowing, and now Conrad complains against Herman for that he has received too small farms, so shall the other three farms be measured: if they are greater, as shown by proof, than the farms which were to be ploughed, so shall Herman be bound by fine and pledge to give Conrad full measure as to the farms, so that all six be of like size, and shall also make compensation to him for the crop which might have grown there. But if the farms be of like size, so must Conrad be content with this, provided that Herman will swear upon the Saints that he sold to Conrad three of the six farms as they lay on village and field, and otherwise not. This is the judgment according to law."

[*Schoeffen-Judgment*, No. 41:] "Engelke, the smith, complains of Cordt Roddecker and Claues Dames, jointly, on account of 4 marks (for Engelke is without written reckoning) up to 100 marks [loaned by him to Roden for them], and complains of them and demands answer. Here answer Claues and Cordt and say that their farmer [Roden] lay sick out of the country, and they sent to him two credible persons who were there when he made his testament and said he did not owe more than 70 marks: that sum we well paid to him [the plaintiff], and we say we are not further liable. Hereupon, etc. If Claues and Cordt can prove and establish a paid debt by the oath of three (the principal the third) as is the law, with credible men, possessing full rights, who cannot be impeached, and who know of this fact that Engelke the smith full and all has been paid the debt which he had loaned to them on account of Roden, thereby shall they be freed and loosed from him. This is the judgment according to law."



XII. 25a.—ANCIENT ASSEMBLY-OAK

This oak, said to be a thousand years old, under which the tribal assemblies met for many centuries, was still standing near  
Kopenhagen, in 1935

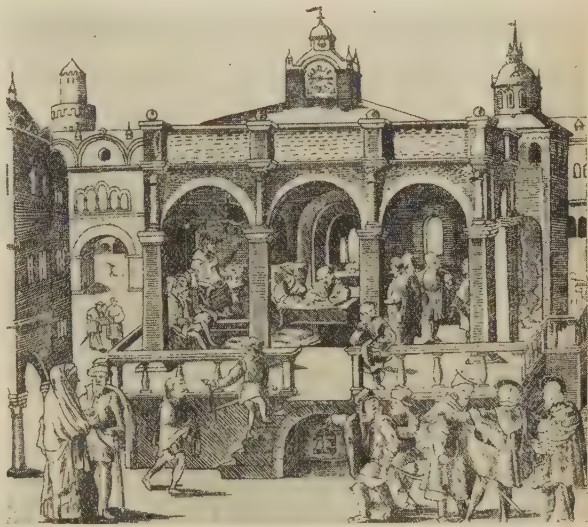


XII. 25b.—THE OLDEST SURVIVING OPEN-AIR GERMANIC ASSEMBLY  
At this assembly, held at Appenzell, in the canton of that name, in 1913,  
some 12000 persons voted by holding up their hands



## 11. Schoeffen-Courts

And in other features, too, the ancient Germanic traditions still prevailed markedly in the pure Germanic regions. Even in the cities the courtrooms were left open on the sides; for, as the Norse God Thor dealt out justice under the great ash-tree, and as the assemblies in Germany had met under oak-trees,<sup>25a</sup> and as even Charlemagne's great assemblies were held in the open,<sup>25b</sup> so the courts long afterwards continued to be held in the open.<sup>26</sup> The Mirror of Saxony prescribes that court be held from sunrise to sunset; no judgment after sunset was valid; a crude drawing of the 1200's shows the court-officers pointing to the setting sun as limiting their powers; and the tradition that a criminal trial must not last beyond one day persisted in England until



XII. 26—TRIAL COURT IN SESSION



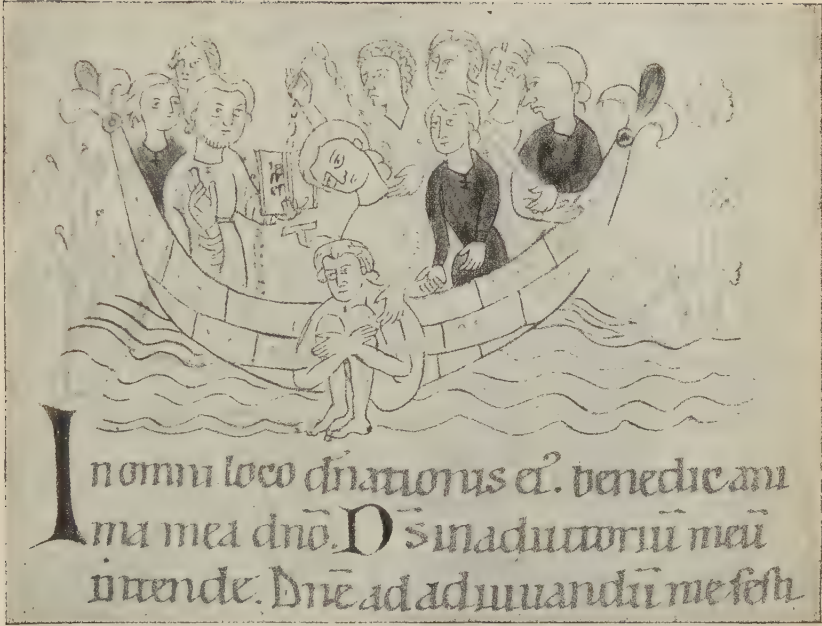
## *XII. Germanic Legal System*

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well into the 1700's. The Germanic procedure of the 1200's still recognized a decision by the formal oath of the party's relatives and friends; and the Mirror of Saxony shows a form for giving decision by twenty-one oath-helpers, and has copious rules about compurgation oaths. The various ordeals also were as yet not entirely obsolete, —the ordeal of cold water, for example;<sup>27</sup> one of the practice-books sets forth the form of words to be used in the invocation of divine judgment, and furnishes a picture to show how the immersion should be done.

12. The use of written deeds had spread northwards from Italy; but the deeds were in Latin, and were prepared by a scribe, and usually neither grantor nor grantee could read the document. What education there was lay entirely with the clergy and the monks. Even the great Charlemagne could never learn to use the pen freely. As late as the 1200's few of the nobles and large land-owners could write more than their names; much less could they write Latin. In this deed of A. D. 757,<sup>28</sup> one of the oldest extant deeds north of Italy, the grantor does not even sign his name; the earliest signatures by grantors do not appear till the 1300's.

The deeds, however, had well developed forms, adapted from the notarial system of Italy. The deed above cited reads thus:<sup>m</sup>



XII. 27—THE ORDEAL OF COLD WATER





## *XII. Germanic Legal System*

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[*Deed from Podal to the Monastery of St. Gall, A. D. 757.*] "I, Podal, for the love of our Lord Jesus Christ and for the remission of my sins, so as to merit pardon in future for my wrongdoings, do give and deliver out of my right and into the right and dominion of the holy church of St. Gall, to remain there perpetually, my estates in . . . . [naming three towns], that is to say, with lands, dwellings, buildings, fixtures, vines, forests, fields, meadows, lands, waters still and running, greater or less, movables and immovables, such as my father on his death left to me. . . . . If I or my heirs or any adverse person should attempt to annul this gift made by me, then let him pay to you or your successors double the claim and take nothing by his claim, and let this present deed remain valid. Done at the estate of Chambiz in public. I Podal have requested the writing of this deed made by me."

[Six witnesses sign by a cross]

"I Arnulf [a scribe] on request have written and subscribed this on Wednesday 6th January, 6th year of King Pippin's reign."

Thus the scribe wrote the deed at the grantor's request. The conveyancing was chiefly in the hands of the monks. They had come to own possibly one-half of all the lands in Christian Europe, through numberless pious bequests, and they were naturally expert conveyancers. The deed just quoted was a gift of three large estates to the Monastery of St. Gall, in Switzerland; the superb library of that monastery well repays a visit; for its archives today are still the greatest repository of old deeds in Europe north of Italy.



### *13. Period of Transfusion*

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#### (IV) FOURTH PERIOD

13. The fourth and last period of the Germanic system—that is, from A. D. 1400 onward—is a period of transformation by Roman, Maritime, and Papal law.

The pure Germanic race (and this includes, of course, the Northmen, the Anglo-Saxons, the Lombards, the Teutons, and the Franks, who have helped to build six or seven modern nations) was not ordinarily inventive, socially or politically. In the phrase of a modern historian, the Germanic race, beginning as plunderers, progressed as borrowers, and brought to high perfection the intellectual goods which it had borrowed.<sup>n</sup> Always, for stimulus, the Germanics needed contact with an older and subtler civilization. For lack of political constructiveness, the Germanic legal system had been of slow growth. At the end of seven centuries from the Salic Code, and after ample contact with Latin literary stimulus, they had developed nothing better than the Mirror of Saxony, whose still crude style we have seen; and yet in a similar period of seven hundred years the Romans had progressed from the crude Twelve Tables to the imperishable science of Gaius and Ulpian.

And so the Germanic system, in its fourth period, disappears, by transfusion, into another and new one.



### *13. Period of Transfusion*

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who was filled with the old obsession that he was the successor of the Roman Caesars, established the Imperial Chamber of Justice,<sup>29</sup> as a central court of appeal, and provided that one-half of its sixteen judges should always be learned doctors of the new Romanesque law, the sun was setting on the power of the old Germanic "schoeffen", or lay-judges, in Germany, their last stronghold; and the doom of the pure Germanic legal system was sealed.

We must now turn back many centuries to outline the rise and spread of these other three systems,—the Sea-law, the Papal law, and the Romanesque law.

## XII. Germanic Legal System

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### *Sources of Illustrations*

1. *A Viking Chieftain*. From a lithograph, artist unidentified, furnished by Thos. Cook & Sons, Advertising Department, London, 1923.
2. *Forsete, God of Justice*. From the illustration in *Clement B. Shaw*, "Tegner's Frithiof's Saga, translated," p. 292 (Chicago, 1908).
3. *A Norse Earl in His Hall*. From the illustration in *Shaw*, p. 57 (cited *supra*).
4. *The Hill of Laws*. From the illustration in *Shaw*, p. 127 (cited *supra*).
- 4.1. *Grágás*. The Grágás has been reproduced in facsimile from the fine M. S. in the Danish Royal Library at Copenhagen, "The Codex Regius Gragas," introd. by Pall Egger Olason (Copenhagen, Levin & Munksgaard, 1932); the illustration shows p. 86 of the MS., containing part of the above quotation.
5. *A Lawsuit at the Ting*. From the illustration in *Shaw*, p. 81 (cited *supra*).
6. *The Assembly Clashes Its Approval*. From the illustration in *Shaw*, p. 297 (cited *supra*).
7. *View of Thingvallir Today in Iceland*. From a photograph furnished by *Halldor Hermannson*, curator of the Fiske Collection in Cornell University Library, 1924. An impressive view of the Thingvallir, from a photograph by *Herbert Felton*, will be found in *Isabel W. Hutchinson*, "A Walking-Tour across Iceland" (National Geographic Magazine, April, 1928, vol. LIII, p. 461).
8. *Reading the Laws from the Tynwald*. From a photograph, furnished by the *Isle of Man Publicity Board*, 1932. Still another view, by the Acme Photos, will be found in the Chicago "Tribune", July 31, 1932.—The Tynwald hill, and the ceremonies, are fully described in *Joseph Train*, "An Historical and Statistical Account of the Isle of Man..... its Ancient Laws", etc., I, 272, 299, II, 188-210 (Douglas, 1845); also, with a quotation from the statute of 1417 prescribing the ceremonies, in *Wm. Radcliffe*, "The Isle of Man" (London, 1925) page 201.
9. *Runic Inscription*. From the engraving in *G. Stephens*, "Handbook of the Old Northern Runic Monuments of Scandinavia and England", p. 53 (London, Williams & Norgate, 1884).
10. *Map of Germanic Migrations*. From the map in *Keith Johnston*, "The World Classical Atlas", plate 23 (Edinburgh, W. & A. K. Johnston, n. d.)

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11. *Germanics Seeking a Settlement*. From the illustration by *A. de Neuville*, in Guizot's "History of France", transl. Black, vol. I, p. 128 (Boston, Estes & Lauriat, n. d.)
12. *Map of Germanic Sway*. Prepared by the author.
13. *Lex Salica MS*. From the facsimile in *Henne am Rhyn* (librarian at the Monastery of St. Gall), "Kulturgeschichte des deutschen Volkes", vol. I, p. 73 (Berlin, Grote, 2 vols. 1886).
14. *Lombard Code of Rothar*. From the facsimile in *Henne am Rhyn*, I, 72 (cited *supra*).
15. *Fuero Juzgo*. From an illuminated facsimile made from the original for the author by the Librarian of the Royal Library at Madrid, 1913.
16. *First Gothic Chief Justiciar of Spain*. From a photograph of the statue, furnished by the Royal Bureau of Engraving, Madrid.
17. *Gulathing Code*. From the facsimile in "Norges Gamle Lov", 1st series, ed. Storm, vol. IV, at end (1885).
18. *Charlemagne at his School of the Palace*. From the illustration by *A. de Neuville*, in Guizot, I, 246 (cited *supra*).
19. *Charlemagne Issuing his First Capitulary*. From a photograph taken for the author by *Giraudon*, Paris, from the painting by *Ary Scheffer*, in the National Gallery at Versailles.
20. *A Family of 1923 Tilling the Same Ancestral Land for Eleven Centuries*. From the Rotograph photograph in the *New York Times*, for Sunday, 1924.
21. *Map of the Mosaic of Jurisdictions*. Prepared by the author.
22. *Law Codes of Harlem, Montpellier, Dax, and Teruel*. From facsimiles in the reprints of the Keurboek of Harlem (1887), Le Petit Thalamus of Montpellier (1840), Le Livre Noir et Etablissements de Dax (1902), and Forum Turolii (1905), in the Elbert H. Gary Library of Law.
23. *Mirror of Saxony*. From the facsimile edition by *Karl von Amira*, "Die Dresdener Bilderhandschrift der Sachsenspiegel", p. 38 (Leipzig, Karl W. Hiersemann, 2 vols., 1902).



## XII. Germanic Legal System

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24. *Mirror of Swabia*. From the facsimile in *F. Steffens*, "Lateinische Palaeographie", plate 111 (Trier, Schaar, 2d ed., 1909).
25. *Trial Court in Session at Prag, A. D. 1536*. From an engraving by *C. Hennig*, in the "Chronik von Böhmen" (Prag, 1852), vol. II, page 46.
- 25.1. *Assembly Oak-Tree*. From a photograph taken by *P. V. Christensen* of Copenhagen, in 1933, furnished by *Hans P. Petersen*, of Evanston, Illinois, of the Assembly Oak in Klampenborg Forest, near Copenhagen. In *John Ottosen*, "Vor Historie," vol. III, p. 92 (Copenhagen, 1904), is a woodcut of one of these local meeting places around a big tree, showing more clearly the circle of stones on which the elders sat.
- 25.2. *Open-Air Germanic Assembly*. From a photograph by *Lichtenstein*, St. Gallen, furnished by *Henry S. Boutell*, of Washington, late United States Minister to Switzerland.—In the canton of Uri, which claimed also to have had the oldest surviving open-air assembly, at Altdorf, a plebiscite of May 6, 1928, abolished the ancient custom; thereafter it meets in the townhall and votes by ballot (Geneva Dispatch in the New York "Times", May 7, 1928).
26. *Trial Court in Session*. From the engraving in *Konrad von Maurer*, "Geschichte des altgermanischen . . . Gerichtsverfahren", p. 362, Appendix A (Heidelberg, 1824). Numerous other views of medieval German courts will be found in the following works: *Franz Heinemann*, "Der Richter und die Rechtspflege in der deutschen Vergangenheit" (pub. Steinhausen, n. d.); *Hans Faehr*, "Das Recht im Bilde" (Munich, 1913).
27. *Ordeal of Cold Water*. From the facsimile in "Monumenta Germaniae Historiae", 4to ed., Sectio V, ed. *Zeumer*, "Formulae", fol. 64, p. 672.
28. *Deed of A. D. 757*. From the facsimile in *Steffens*, plate 38 (cited *supra*).
29. *Imperial Chamber of Justice*. From the engraving in *von Maurer*, p. 362, App. C (cited *supra*).

### Sources of Documents Quoted in Text

- a. *Gragas*. Translated from the edition of *V. Finsen* (Copenhagen, 1852), "Gragas", cap. 117; Icelandic text in Part I, page 216, modern Danish text in Part III, p. 215.

## Sources

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- b. Tacitus, "Germania", c. 11: "Si displicuit sententia, fremitu adspersantur; sin placuit, frameas concutient." Compare Homer's description, in chap. VI, *ante*.
- c. Njal's Saga. From the translation in Sir *George Webbe Dasent*, "The Story of Burnt Njal", c. 140 (2 vols. 1869; reprint by J. M. Dent, London, and E. P. Dutton, New York, Everyman Series). That the "lawman" may be an institution common to all primitive tribal peoples, surviving among the Beduin Arabs in modern times, see the passage from *Lawrence*, "Seven Pillars of Wisdom", cited *ante*, Chap. IX, Sources of Documents, Note *t*.
- d. Salic Code. Translated from the text in *J. H. Kessels* and *H. Kern*, "Lex Salica" (London, 1880).
- e. Bishop Agobard. Translated from the Latin of "Agobardi Opera", in *J. P. Migne*, "Patrologia Latina", vol. CIV, col. 116.
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- l. Judgments of the Schoeffen. Translated by Robert W. Millar from the old German text in *Hermann Wasserschleben*, "Deutsche Rechtsquellen des Mittelalters," pp. 149, 2, 17 (Leipzig, 2d ed., 1892).
- m. Deed of A. D. 757. Translated from the text in *Steffens*, cited *supra*.
- n. See this opinion as phrased by *T. Peisker*, in "Cambridge Medieval History", vol. II, c. XIV, p. 433.

## XII. Germanic Legal System

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THE  
MARITIME  
LEGAL SYSTEM





## Prologue to Chapters XIII, XIV, XV

The Germanic peoples had overspread all Europe west of Russia. Their political and legal system had now come to dominate, displacing or absorbing or penetrating, in variant degree, the original institutions of the Keltic and Slavic and Romanic areas thus occupied. But it developed at a slow pace, and it was unequipped in several elements to meet the new needs of the times. At this juncture, about the 1400's, it found flourishing alongside of it three other systems, which possessed its missing elements and competed to supply them.

These were the Maritime system of sea-law, the Papal system of church-law, and the resurrected legal science of Justinian. The grand phenomenon of the centuries A. D. 1100-1800 is the parallel growth and ultimate amalgamation of these four systems.

The three other systems had been growing up gradually, independent of any one race or people in their origin; but by this time the course of events was bringing them into close contact with the now widely spread Germanic institutions. All three were before long to be

## *Prologue*

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absorbed and to lose their identity in the process of nationalization of law, now going on. But all three had their origins long before the 1400's. So it is now necessary to turn back for some centuries and to sketch their origin and progress.

And, first, the Maritime legal system.

### XIII

#### *The Maritime Legal System*

##### *(I) The Common Law of the Sea*

1. Egyptians and Phoenicians.
2. Rhodian law.
3. Code of Amalfi.
4. Venice and Genoa.
5. Barcelona—Consulado del Mar.
6. Laws of Oleron—Oak Book of Southampton.
7. Sea-laws of Wisby—Hansa Shipping Ordinance—Shift of the centre of code-making from east to west and north.
8. Unity of evolution—Rules for jettison, compared.
9. Mariners' self-government.
10. Court-judgments—Legislative process in the Hansa ordinances.

##### *(II) The National Laws of the Sea*

11. French Marine Ordinance—Other national codes.

##### *(III) The Common Law of the Sea, Once More*

12. York-Antwerp Rules—Hague Rules of 1921.
13. The Bill of Lading as an international Common Law of the Sea.

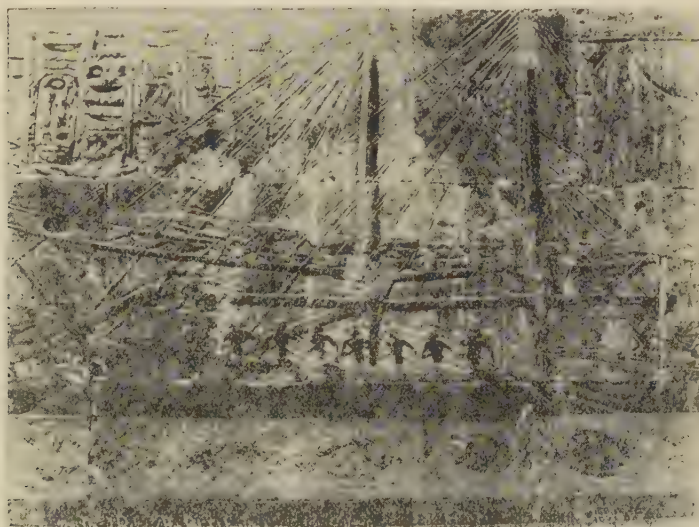


### XIII

## The Maritime Legal System



THE earliest picture of a boat, found on an Egyptian vase, has been dated at some 6000 years B. C. The earliest recorded overseas expedition—that is, away from the coast—is that of an Egyptian king, dating about B. C. 2900. But the oldest picture of a sea-going ship of large size is the sculptured ship of Queen Hatsheput, in Egypt, about B. C. 1500.<sup>1</sup> This queen was already known to be a ruler of distinction; but owing to an inscription on Mt. Sinai, only deciphered in 1925,



XIII. 1—QUEEN HATSHEPUT'S SHIP, B. C. 1500, IN EGYPT



### *XIII. Maritime Legal System*

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perhaps her greatest fame in future will be that she was the princess who discovered the infant Moses in the bulrushes and saved him to become the Hebrew leader.

The Egyptian maritime achievements were later overshadowed by the Phoenicians, who made themselves masters of the Mediterranean for many centuries. Then came the Greeks, their rivals and successors as maritime traders. And so the names of Phoenicia, with its great coast cities, Tyre and Sidon, and of Rhodes, the island at the eastern end of the Grecian Archipelago, are inseparably associated with the beginnings of maritime law.

#### (I) THE COMMON LAW OF THE SEA

1. The sea-traffic must have been enormous. Tyre, a Phoenician city, had probably more than a million population; Carthage, another Phoenician city, seven hundred thousand; Alexandria, a Greek city, the world's grain market, had one million. In the period five centuries before Christ, the coasts of the Mediterranean, as the map shows,<sup>2</sup> were already dotted with colonies and trading-posts, from end to end. And when it is remembered that for 3000 years before Christ the several nations swarmed with their ships trafficking along all the shores of this inland ocean, one can realize how the sea-commerce of the Mediterranean has formed a continuous body of custom dating back at least 5000 years before today. The empires

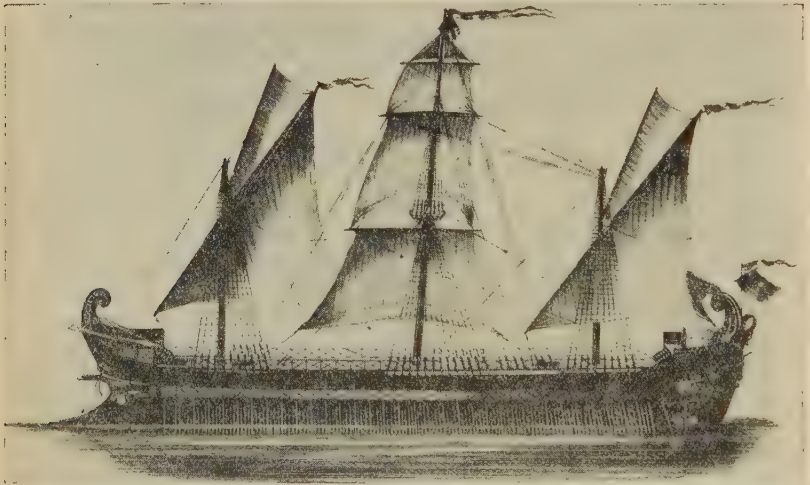


XIII. 2—COLONIES OF THE MEDITERRANEAN, B. C. 500

### *XIII. Maritime Legal System*

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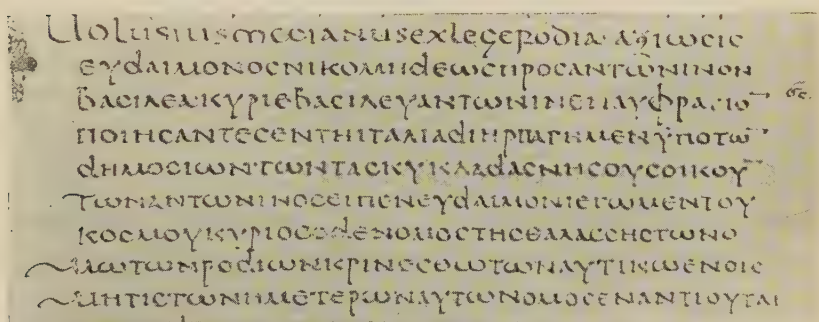
on land rose and fell, one after another; and from time to time Europe's land found itself in a general condition of political and legal chaos. But through all these vicissitudes there lived on at least one continuous, growing, and mature body of law. The sea law continued, independently of racial and dynastic changes, because its vogue was in a region owned by no king or tribe or chieftain,—the Sea. The galleys were its home.<sup>3</sup> The mariners of all waters had a common life and experience; their common guide was the sun by day and the stars by night; and so the common custom of sea-merchants was sea-law.



XIII. 3—A GREEK FIVE-BANKED GALLEY

## 1. *Earliest Maritime Peoples*

This formed a system by itself. Centuries later, it was destined to be absorbed into the various territorial national laws. But for nearly five thousand years it lived its own separate existence,—formulated by no sovereign, yet gradually codified, and obeyed by all. How separate it was, in its supremacy, can be realized from an anecdote in the Roman Digest, preserved in Greek;<sup>4</sup> it reads: "A certain man brought a case about shipwreck to the



XIII. 4—ROMAN DIGEST: THE LEX RHODIA

Emperor Antoninus, for decision; but the Emperor replied: 'I am indeed the supreme lord of the land. But Custom is the lord of the sea. Let this case be decided by the sea-law of the Rhodians, which our law accepts'."

This body of sea-law, in pre-historic times, had begun with the Phoenicians. But its leadership gradually shifted west and north with the expansion of commerce.

### *XIII. Maritime Legal System*

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The history of this shifting is the history of maritime law.

2. No record of Phoenician sea-law has survived. But tradition has preserved a few of the sea-rules of Rhodes, which became the next leading centre to be heard of. Rhodes was one of the large Greek islands lying eastward towards Egypt. Rhodes reached the height of its prosperity about B. C. 300. It had succeeded to the primacy of Athens as the emporium of Greek commerce and a centre of arts and letters. The massive bronze Colossus,<sup>5</sup> one hundred and five feet high, which was located on the pier at the entrance to its harbor, was deemed one of the seven wonders of the ancient world; when its fallen remnants were sold for metal, A. D. 600, it took nine hundred camels to carry them off. Young men were sent to Rhodes from other cities to learn commercial methods; and the world-famous statue of the Laocoön was made by a Rhodian artist. The city was said to contain three thousand marble statues. The port of Rhodes had six practicable harbors; and the Rhodians were termed "the masters of the sea". No authentic text of the Rhodian Code has survived. But all sea-law for the ensuing thousand years was known as the Rhodian law.

3. Then, as commerce shifted, the next code of general vogue was that of Amalfi, not far from Naples;<sup>6</sup> for the centre was again shifting west. The Code of





XIII. 5—THE COLOSSUS AT RHODES



### 3. *Code of Amalfi*

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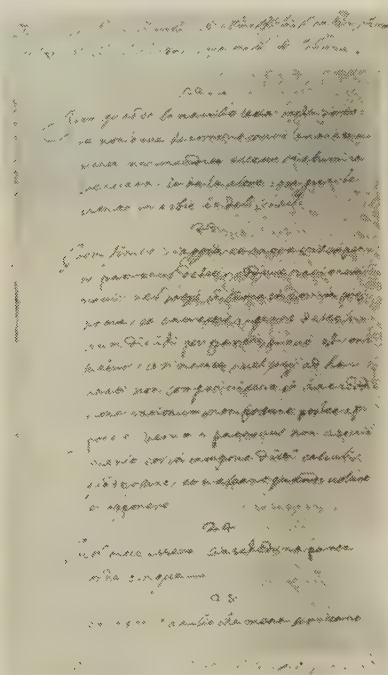


XIII. 6—AMALFI, FROM THE SEA

Amalfi was formulated in the 1000's. Amalfi is now a small town of five thousand souls; and nothing is left but its Cathedral to testify to the prosperity and fame which enabled its sea-law to command respect 900 years ago. But in its brief day it was immensely rich, with a population of fifty thousand, and colonies in Syria, Arabia, India, and Africa. The Amalfitans claimed and were long reputed to have invented the mariner's compass; the crest of the city bore the motto: "Prima dedit nautis usus magnetis Amalphis". Even as late as A. D. 1570, a mercantile author, Freccia, declared that Amalfi's Code eclipsed the Rhodian law, for "all disputes, all lawsuits, and all sea-controversies were decided by the law of Amalfi."

### *XIII. Maritime Legal System*

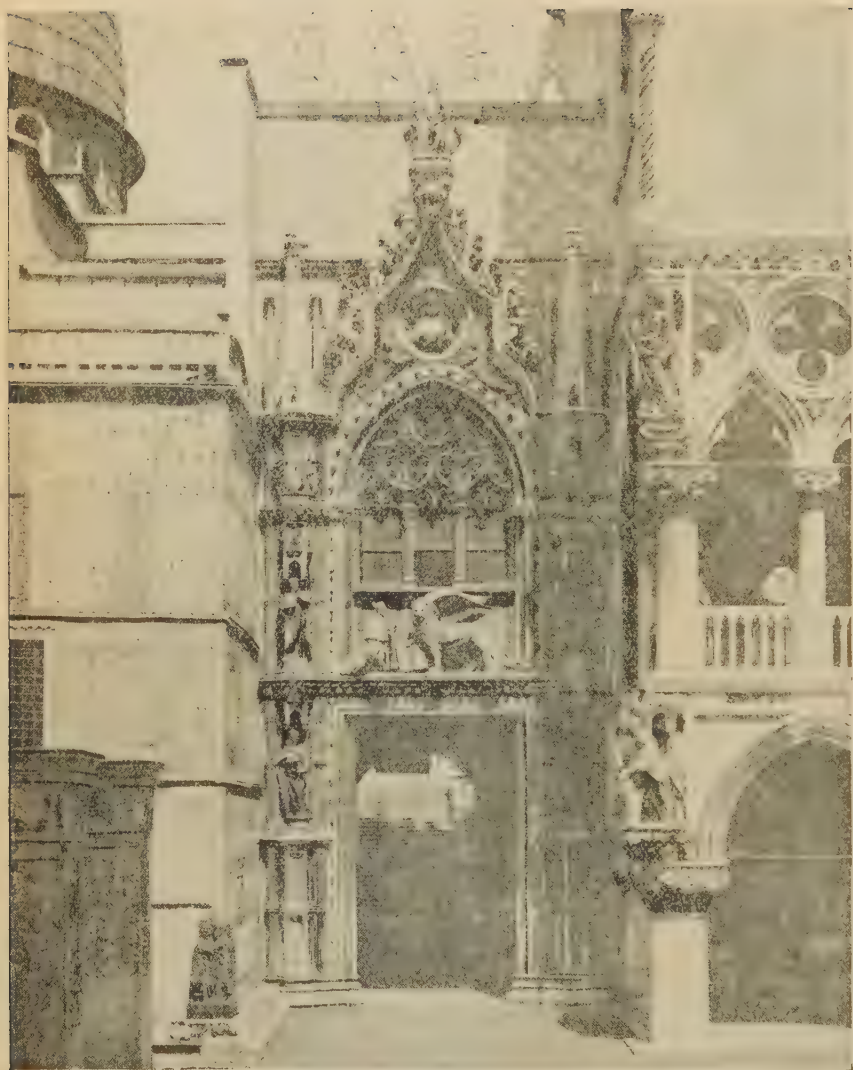
The text of the Code of Amalfi was lost for centuries, and was only re-discovered in 1843, in an obscure manuscript in Vienna, obtained from Venice by the Austrians; after the World War, the manuscript was returned to Italy, its common name, as the title shows, was the Tablet of Amalfi;<sup>7</sup> for it was perhaps inscribed on tablets nailed up in public.



XIII. 7.—THE CODE OF AMALFI  
This manuscript was brought back  
from Vienna to Amalfi after  
the World War





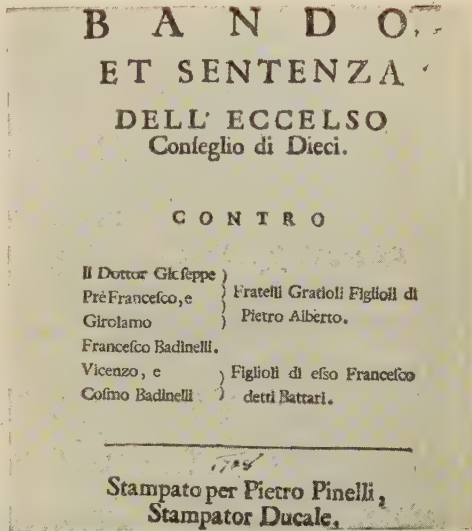


XIII. 9—GATE OF PLACARDS, VENICE  
Here were posted the Judgments of the Council

#### 4. *Venice and Genoa*

4. Each one of these commercial coast-towns had its own book of sea-law,—Venice, Pisa, Genoa, and a hundred others. But none of these three greatest commercial cities of the Italian Middle Ages seems to have impressed its leadership on the maritime common law.

Venice became famous for its government, and particularly its Council of Ten. The Council's judgments were promulgated by printing them<sup>8</sup> as leaflets, a copy was posted at the entrance to the Ducal Palace, called the Gate of Placards,<sup>9</sup> and other copies sent to all the local magistrates. The Council of Ten held its meetings in a room in the Ducal Palace, magnificently decorated with frescoes by some of Venice's greatest painters,—an example which should be imitated in our own courts of justice. The adjacent room was the chamber of the celebrated Inquisitors, who interrogated the accused before he was brought in to trial before the



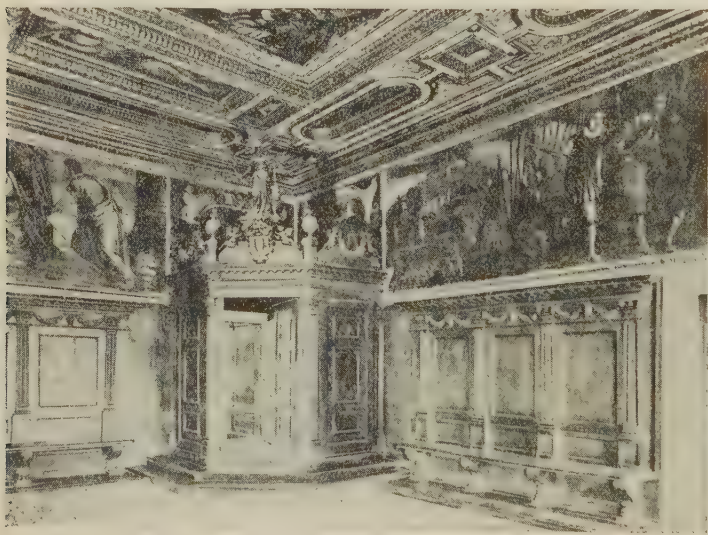
XIII. 8—A JUDGMENT  
OF THE VENETIAN COUNCIL OF TEN

### *XIII. Maritime Legal System*

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Council. And the square panel in the wall at the lower left corner of the picture concealed the box in which anonymous complaints were dropped; for on the other side of the wall, in the public corridor, was a slit with a lion's head, called the Lion's Mouth (or "bussola"), into which papers might be inserted without revealing the informant's identity.<sup>10</sup>

Genoa was famous for its inventiveness in commercial methods. The Bank of St. George,<sup>11</sup> founded about A. D. 1400, and long the greatest of its kind, still stands, down at the city's water-front; and the archives of Genoa contain some of the earliest known examples of bills of



XIII. 10—CHAMBER OF THE INQUISITORS, VENICE

#### 4. *Venice and Genoa*

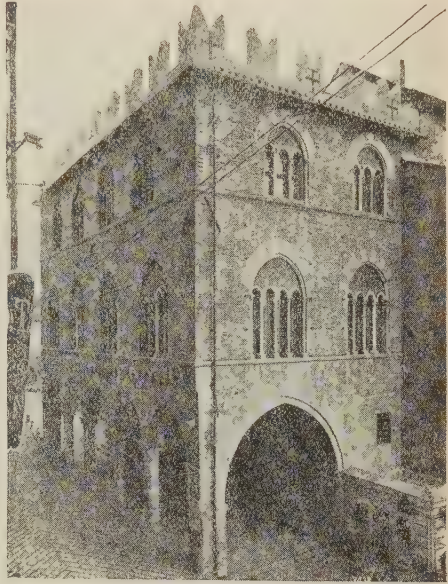
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exchange and policies of marine insurance.

But neither Genoa nor Venice, even at the height of their sea-powers, ever set the standard for marine law.

5. We hear of no common code for another two or three centuries after the Amalfi Code, when the centre is now found shifting again westward to Barcelona.<sup>12</sup> A papal official, describing Barcelona at the end of the 1400's, said of its laws: "In almost every maritime city the controversies of mariners and of merchants are settled by them, or by laws derived from them, with the greatest authority; and as formerly men spoke of the laws of Rhodes, now everyone speaks of the laws of Barcelona."

The Code of Barcelona was known as the *Consulado del Mar*, or Book of the Jurisdiction of the Sea, and first took shape in the 1200's; one of the best manuscripts is in



XIII. 11—BANK OF ST. GEORGE, AT GENOA



### *XIII. Maritime Legal System*

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XIII. 12—BARCELONA, FROM THE SEA

the National Library at Paris.<sup>13</sup> The *Consulado del Mar* was written originally in Catalan, the language of Barcelona. It was first printed in 1494; but the fourth edition of 1523 is probably the only early edition now to be found outside of a few European public libraries.<sup>14</sup>

The provisions of the *Consulado* were more diffuse and its details more elaborate than in any other of these sea-codes. It contained some two hundred and fifty short chapters; and their style may be gathered from this passage, in Chapter 80, about the rights of the mariner to his wages:<sup>a</sup>

[*The Consulado del Mar*, chap. 80.] "Further you should know that the managing owner of a ship ought not to dismiss a mariner



de bombesie filars ee in ur  
 rum forfari pro pportua  
 rem de stupa. ee y p ac  
 tata ranoys lra deca mo  
 nes ee p mortari forfi  
 ri de pueris encostum ee  
 in jenois p mortari in  
 caria uel barilly ee p p  
 mortari jenois de lara  
 de capillis ee uy lo qro  
 forfari p mortari et in  
 alyis solia sollos de alum  
 bmo sollo et p pde ee uy  
 jenois p mortari et talys  
 sollos sollos ee y p  
 Dels bons stabliments e cos  
 tumes de la mar

**A** qrs por los bons  
 p bliments e los bo  
 nos costumes qui  
 son de fet de nre qrs si  
 ny homes qui ita p lo no  
 ne començen aue los nres  
 antecessors facer p los  
 libres de la puerat de los  
 bones costumes. On diq  
 aut pder trobar remoe  
 de nau q deu fer amedi

e a mar q m d'egen ca  
 alia l'ham q m d'egen ca  
 que deu fer m d'egen ca  
 ne m d'egen ca p m d'egen ca

**A** nre m d'egen ca  
 pa m d'egen ca  
 p m d'egen ca  
 der ne p m d'egen ca  
 palas, ca m d'egen ca  
 deu deu m d'egen ca  
 p m d'egen ca m d'egen ca  
 tol de començament de  
 Han ho de l'orn

**O** començament de l'orn  
 vor m d'egen ca de l  
 ley començament de l'orn  
 e m d'egen ca m d'egen ca  
 de e fer començament de l'orn  
 m d'egen ca de qui m d'egen ca  
 ne de qui m d'egen ca  
 m d'egen ca en sentim ne qui  
 obtem ne qui m d'egen ca  
 Capitol si nagi promera  
 de fer p m d'egen ca m d'egen ca

**A** si agd fira entonç  
 lo remoe de la nau  
 ale p m d'egen ca li p m d'egen ca  
 ten de fet p m d'egen ca p m d'egen ca

### XIII. 13—THE CONSULADO DEL MARS (MS.)

The title, in the middle of the left column, reads: "Dels bons stabliments e costumes de la mar", and the text begins, "These are the good rules and customs. . . which our ancestors made"

Seguire lo Libre de Consolat nouament  
 corregit y stampat. En lo qual son tengudes  
 les lers: e ordinacions dels actes maritims:  
 e Mercantinols. Et primo.

En qual manera son  
 elers los consols e lo jutge de les  
 appellacions qualseu Llyc.

Capitol primer.



**Q**ualseu any  
 lo vespre d'a festa de  
 Nadal: d' nostre Se-  
 nor los promens na-  
 uejants patrons ma-  
 riners: ho partida de aquella a ple-  
 sien consili en la celsia de sancta  
 Tecla de la ciutat de València. E  
 aquí per electio: e no per redolins  
 tots en una edcordança o la minor  
 partida elegire dos bons homes  
 dela art de mar en Llóla. E en  
 home dela dita art dela mar: e no  
 de altra altra art: ho hofiet: o lers  
 en un altre dels appellacions: ho  
 fan pels sentencies dela dita cons-  
 sola. E los inter electio son fetes  
 per pors: que los promens dela  
 dita art dela mar son del Senyor  
 e de los autors.

Del juramet que fan

los consols.



**D**ia d' Nadal los dits  
 consols elers juren en  
 poder dela justicia ci-  
 vil d'a dita ciutat d'a  
 la esglesia d' nostra do-  
 na sancta maria d'a seu: apres quel  
 dit justicia a jurat en poder del sen-  
 nor Rey: ho de son batle: que be  
 e lealment se hauran en lo offici del  
 dit consolat: que daran diet ari al  
 maior: com el menor: e al menor cõ  
 al maior: saluant tota hora la faelo  
 far: e lealtat del Senyor Rey.

Los lo jutge d'apella-  
 cio presentat: e com jura.

Capitolan.



**D**ia d'a dita festa de  
 Nadal los dits ab al-  
 guns promens de mar  
 presenten lo dit jutge e  
 ler al portat vens al p-  
 curador en lo regne de València: ho  
 a son lealment: e jura en poder de  
 quell: que be e lealment se haura en  
 lo dit offici. E aquell qui plos: e ho

## 5. *Code of Barcelona*

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from the ship until the voyage is concluded, except for three things, in the first place for robbery, in the second place for quarrelling, and in the third place if he does not obey the orders of the mate. The mate, however, ought not to command him to do anything which is not within his command, and the mariner ought not to be dismissed upon the first occasion of disobedience, but only upon the fifth occasion. . . . .

“Further, the managing owner of the ship is bound to the mariner, that if the mariner has agreed with the managing owner of the ship for a high rate of wages, and the managing owner of the ship shall find another mariner at a lower rate of wages, he cannot dismiss him from the ship so that he shall not sail in it, after he has once agreed and shaken hands upon it; for he is bound to observe such an agreement, as if it were entered in the ship’s register.

“Further, the managing owner of the ship is bound to the mariner, that if the mariner has agreed with the managing owner of the ship, the latter cannot dismiss the mariner to make place for a relative or another man after his name has been entered in the ship’s register, or after they have shaken hands, whether or not he has been received on board ship; and if he wishes to dismiss him he must pay him his wages precisely as if he had completed all his services during the voyage.

“Further, the managing owner is bound, if the mariner has worked for three days and is taken ill, to pay him half his wages, and if he cannot embark on the ship, he ought to dismiss him, if the mariner judges that he cannot go; and if he is in a strange place, the managing owner of the ship has to give him half his wages, whether or not he has money enough to pay them, and if he have not money enough, he must borrow it, for it is incumbent that the mariner should have his wages; and if the managing owner dies, his executors ought to discharge this obligation.

### *XIII. Maritime Legal System*

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"Further, the managing owner is bound to the mariner, that if the mariner falls sick and dies in the vessel, he ought to be paid all his wages, and if he has on board any relative, the effects of the deceased should be given up to him, and, whether the deceased has said so or not, shall be handed over to his children or his wife, if they were living with him whilst he was alive. And if his wife was not loyal to him, or was not living with him when he was last on shore, or shall have run away after his departure, the managing owner of the ship with the ship's clerk, with the consent of the courts, shall give them to his nearest relatives.

"The mariner who shall be engaged for the voyage and shall die by the will of God before the ship has sailed, ought to have a quarter of his wages, which should be assigned and given to his heirs. Further, if he shall die after the vessel has set sail, and before she arrives at her port of destination, the half of his wages shall belong to the deceased, and shall be given to his heirs; and if he shall have received all his wages before he dies, the whole ought to belong to him and be given to his heirs, and the managing owner of the ship cannot dispute anything, nor claim anything back.

"If the mariner is engaged by the month and dies, his heirs should be paid for all the time which he has served.

"Further, the managing owner is bound to pay to the mariner his wages at the place where the merchandise pays freight."

The extensive vogue of the *Consulado* caused it to be translated into several languages, for the benefit of mariners of other countries. An edition was printed as far east as Venice, in 1566, in an Italian translation;<sup>15</sup> and indeed some Italian scholars once claimed Italy as the place of its origin. And other editions were printed as far north as Amsterdam, in Dutch and Italian, in 1704 and



LIBRO  
DEL CONSOLATO  
DE' MARINARI.

Nelquale si comprendono tutti gli statuti, & ordini  
disposti da gli antichi per ogni caso di Mercantia,  
ò di Nauigare, così à beneficio de' Marinari, come  
de' Mercanti, & Patron de' Nauilij.

*Con l'aggiunta delle ordinationi sopra l'Armata  
di Mare, sicurtà, entrate, & uscite.*

DI NUOVO RISTAMPATO, ET  
*con ogni diligenza corretto.*



IN VENETIA,  
Per Andrea Rauenoldo.  
M D LXVI.





XIII. 16—THE CONSOLATO, IN DUTCH

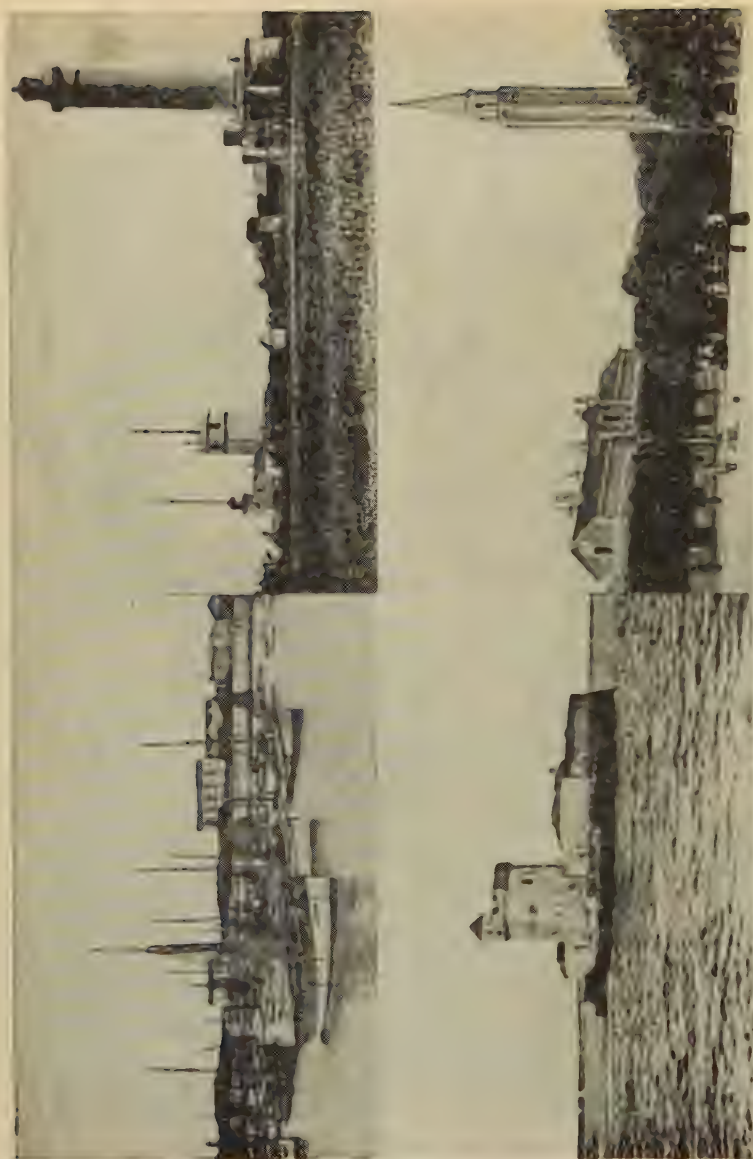
## 5. *Code of Barcelona*

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1723.<sup>16</sup> Its vogue thus extended through five centuries.

6. But in the meantime, new trade centres were starting in the north; and in the A. D. 1200's and 1300's a new codification had obtained vogue, named from the island of Oleron, off New Rochelle, in the Bay of Biscay,<sup>17</sup>—a region which was then English territory. There is a manuscript of it in the British Museum;<sup>18</sup> for this code was used by English and Scotch and Norman mariners also. Southampton was then one of England's great seaports; the Oak Book was the book of local customs of that seaport; and a fine MS. copy of the Laws of Oleron dating from about A. D. 1300 has recently been brought to light in the Oak Book of Southampton.<sup>19</sup> So closely was the Code of Oleron associated with English maritime customs that its authorship used to be attributed to King Richard the Lionhearted, when he returned from the Crusades.

7. The Laws of Oleron served as a sea-code for north-western Europe for several centuries. But meantime, the Hansa League of the Baltic had come to dominate northern commerce all the way from Hamburg and Bremen to Novgorod in Russia. Its headquarters were first at Wisby on the island of Gotland, in the north Baltic, and hence its code was at first known as the Sea-Laws of Gotland. Wisby had some twelve thousand merchants in the 1200's; but it was destroyed and plundered by King



XIII. 17.—THE ISLAND OF OLERON

remorement leu fine en home maist  
Sunt mef la mef est a deux homes  
En a trois la mef son pume du pume  
Sunt il est a quatre a plusieurs ou  
a la godest ou a l'adire & si ficee p  
aler en pume est ainger le maist  
ne por pas vendre la mef sil nad remaundement ou  
pumaion des seignours mef sil ad miste & despu  
se il pora bien metre a l'adire des apparailles ou gages  
p conseil des compaignons de la mef Et ceste le  
uagement en cest cas

ne mef est en un home & deuient p arrendre  
son temps & parier dient a son pume le maist  
de arrendre conseil ou se compaignons a li dire p  
noue ament & se a l'adire desu r a l'adire le temps  
est bail & en a maist p de arrendre ou le plus des  
compaignons & sil fusen ament il est rema a vendre  
la mef & les homes Si ele se pde ne p si staff sil ad de  
mior Et cest le uagement en cest cas

ne mef soit pte en y l'adire desu ou en quel lieu  
p a l'adire les pma mo l'adire rema a l'adire le plus  
ou pume de la pte & des homes si sil p arrendre le maist  
est rema a l'adire sil nad rema de ce qui mont p l'adire  
p le maist en l'adire rema si sil nad rema il n'est  
pume rema & mef l'adire l'adire ou de l'adire pume  
pume l'adire l'adire rema la mef est pte Et le







### XIII. 19—THE OAK BOOK OF SOUTHAMPTON

In this book was discovered in recent times a manuscript text of the Laws of Oleron



XIII. 20—WISBY'S GATE AND ISLAND

This town gave the name to a maritime code for northern commerce

## 7. *Hansa Code*

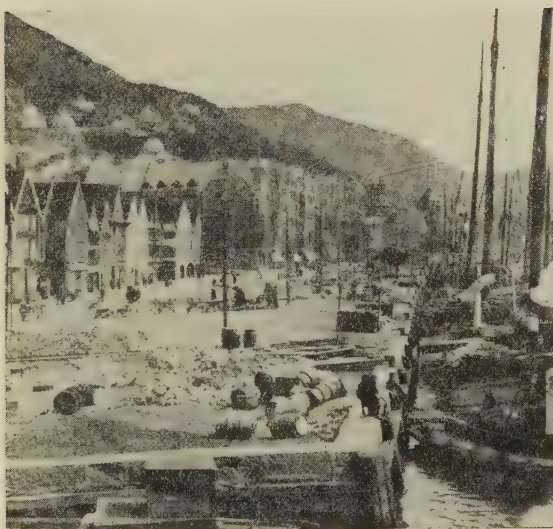
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Waldemar of Denmark in 1361, and never recovered from the blow.<sup>20</sup> The centre then shifted to the north German towns. In A. D. 1367 at the town hall in Cologne the delegates of seventy-seven cities met and formally organized the Hansa League.

The League became one of Europe's great powers. Its rules were more potent, in its field, than those of pope or emperor; for it could ruin a commercial town by its boycott. The Hansa had colonies everywhere in Europe. The most southerly site was at Venice, where today may still be seen the Fondaco dei Tedeschi, or Warehouse of the

Germans.

The most northerly centre was Bergen, on the coast of Norway;<sup>21</sup> and the long row of twenty-two buildings of the Hansa, which dominated the water-front, re-



XIII. 21—THE HANSA YARD AT BERGEN, NORWAY

### *XIII. Maritime Legal System*

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XIII. 22—THE HANSA STEELYARD, LONDON

mains intact today. Some three thousand souls here formed the Hansa staff, all vowed to celibacy, and organized in guilds, each representing a foreign ity. In London, the Hansa was equally strong; their establishment, known as the Steelyard<sup>22</sup> (because there stood the great city-scales for weighing all imports), was located just above London Bridge, at the only water-gate of the city, thus commanding the key to the whole foreign commerce of London. Bremen was one of the League's strongholds in Germany. But the most frequent meeting-place of the League Council was at Lübeck.<sup>23</sup> This city

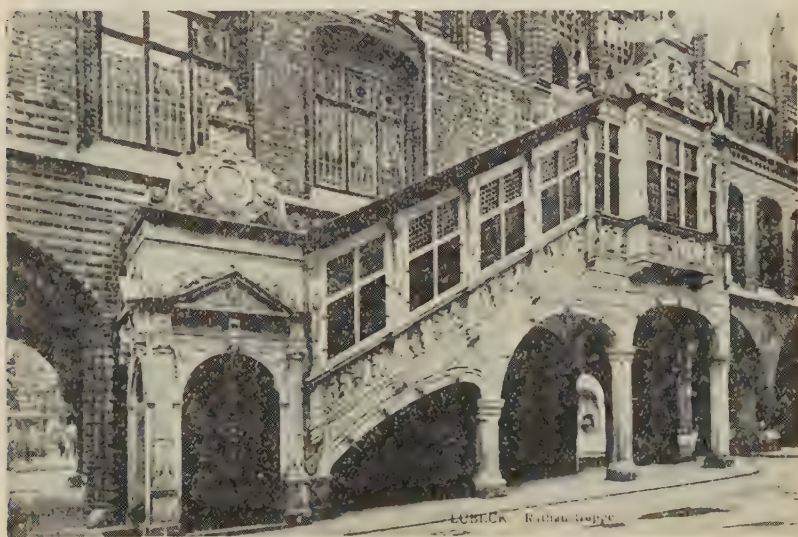


## 7. *Hansa Code*

and Bremen were the last two members of the Hansa; for its power gradually declined, and in 1630 at Lübeck at its last general meeting only Lübeck and Bremen sent delegates.

The Hansa League had adopted the Sea-Laws of Wisby, which themselves were an adaptation of the earlier Laws of Oleron. An edition of the Hansa Code, printed at Lübeck in the year 1657, calls itself the Hansa Towns' Shipping Ordinance.<sup>24</sup>

Thus, the centre of fashion, in maritime code-making, had swung gradually around west and north,<sup>25</sup> through



XIII. 23—THE TOWN COUNCIL HOUSE AT LÜBECK



Der Erbaren  
Hanse- Städte

# Schiffs-Ordnung vnd See-Recht.

Derensich ihre Bürger / sonderlich die Schiffs-  
Rehdere / Desfrachtere / Schiffer vnd Schiffe  
vnter zu verhalten.

Von neuem überschehen vnd gebessert / vnd vnter  
gewisse Titul außgetheilet



Lübeck.

In verlegung Michel Volcken/  
Gedrucket durch sel: Schmalhergens Erben.

ANNO

M. DC. LVII.



XIII. 25 VAL OF THE SHIP OF MARITIME CODIS

### *XIII. Maritime Legal System*

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three quarters of a circle, during two thousand years, from Rhodes, through Amalfi, Barcelona, Oleron, up to Wisby and Lübeck.

8. Now the remarkable feature in these several successive codes is the unity of their evolution as a single, distinct, and continuous body of maritime custom.

To illustrate this, let us take, almost at random, one of the distinctive features of sea-law, not found in land-law,—jettison—and trace it through all the codes.

The act of casting goods overboard in a storm to save the ship and its contents is known in sea-law as jettison; and when by jettison one man's goods are sacrificed, the others whose property is thus saved must repay him, each a ratable share. But there was, in the old common law of the sea, a peculiar provision for the procedure to be followed. In the Rhodian law as phrased in Greek at Byzantium, about A. D. 700, Article 9 says on this point: "If the captain is deliberating about jettison, let him ask the passengers who have goods on board, and let them take a vote what is to be done." Note this democratic idea of a joint enterprise; the merchants must first be consulted before the captain can lawfully jettison.

This feature has totally disappeared in modern law. But we can trace it for nearly 2000 years in the old law.

## 8. *Unity of Evolution*

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Going west in the line of evolution, we next find it persisting in Art. 48 of the Code of Amalfi. This draftsman, a philosopher, adds naively: "If the merchants are greedy, as some people always are, and would rather die on the spot than sacrifice anything, so that by their extreme avarice they refuse to jettison, then the captain after protest may proceed to jettison."

Then two centuries later, in the Consulado del Mar, of Barcelona, the same rule reappears, with much elaboration; here, the author provides a set speech which the captain must deliver in the presence of the mate and all on board: "Gentlemen, if we do not lighten the vessel we run great risk of losing our lives and everything; but if you, gentlemen, consent to lighten ship, then by God's will we can save ourselves and a large part of our goods; but if we do not cast them over, we shall lose ourselves as well as all that we have"; then if all or the majority of the merchants consent, the jettison may be made; but one of the merchants must first cast over something, then the captain may cast over the remainder.

Next, in the Laws of Oleron, the same rule is found once more, here again supplying the captain with a speech, but a shorter one than in the Consulado.

And finally in the Wisby Code and the Hansa Code, Title VII, Art. II, it appears once more, with little change,

### *XIII. Maritime Legal System*

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but without the words of the speech. And a notable thing, which marks the world-wide universality of sea-rules, is that in a sea-code of the Malay Islands, in the East Indies, dating back to the first Mohammedan Sultan, in the 1200's, is found an explicit provision of this identical nature, calling for a consultation of the merchants, and fixing the rule for counting the votes of each.

This provision about the formality of jettison serves to illustrate the continuity and identity of the common law of the sea through nearly two thousand years.

9. All of these sea-codes purported to represent the custom of the sea,—not the law of any territorial prince. They grew as the anonymous embodiment of these common customs. The title and opening sentence of the *Consulado*, as of most of the others, reads: “*Aci comencen les bones costumes de la mar*”, “Here commence the good customs of the sea. These are the good establishments and the good customs on matters of the sea, which the wise men who traveled over the world commenced to give to our predecessors, who put them into books of the wisdom of the good customs”. These codes owed their force to no prince or king or republic; and no jurist's name was associated with any of them as its original author or draftsman. Even the very city in which they originally took form was sometimes uncer-



## 9. *Maritime Self-Government*

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tain; for Pisa and Marseilles, as well as Barcelona, once disputed for the place of origin of the Consulado del Mar.

And these customs, as rules, were enforced by special maritime courts elected by the guilds of the sea-trades, not by the ordinary territorial courts of the prince or seignior. Genoa, Pisa, Barcelona, and all the great mercantile sea-ports had each its court of the sea. This self-government of the sea by its own customs is illustrated in the opening sentence of a Spanish ordinance of A. D. 1283, sanctioning the Court of the Consuls at Valencia, and often prefixed to editions of the Consulado del Mar:<sup>b</sup>

[*The Sea-Guilds Elect Their Judges.*] "Every year, after noon on the day of Noel or Our Lord's Nativity, the elders of the sea-guilds, the masters, and the mariners, or any of them, meeting in council at the church of St. Pecla, in the city of Valencia, shall by vote (not by lot), whether unanimous or by majority, choose [two] good men of the sea-trade to be consuls, and one other man (of the same trade, not of any other trade or learning or position) to be judge of appeal from the judgments of the former; the said elections being held by privilege of the elders of the guild of the sea held of the king and his predecessors.

"After the said feast of Noel, the said consuls, with some elders of the sea, will present the said elected judge of appeal before the attorney-general of the Kingdom of Valencia or his deputy; there he will take oath to behave well and legally in his office; and he who is thus presented as judge of appeals before the attorney-general must be received by him in that post; for such has been the custom, notwithstanding that by the king's charter granted to the elders of the sea it is said that annually the judge shall be chosen 'by the

### *XIII. Maritime Legal System*

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king or his attorney-general', for neither the king nor his attorney-general has ever exercised this power, the above mentioned formalities being the only ones used.

"The consuls shall judge all questions of freight. . . . [etc., etc.], and generally all contracts mentioned in the Customs of the Sea. . . . The judgments given by the consuls and the judge shall read 'according to the Customs of the Sea', and shall conform to what is laid down in the several chapters of that book."

10. These codes, no doubt, were usually in their origin the outgrowth of a long succession of decided causes; they summed up in convenient form the result of numerous judgments on important typical cases. Indeed, the Laws of Oleron were often entitled "the Judgments of the Sea", and each of their paragraphs is in form a ruling on a case put; thus:

"A ship departs from Bordeaux or elsewhere; it happens sometimes that it is lost, and they save the most they can of the wine and other goods. The merchants and the master are in great dispute, and the merchants claim from the master their goods. They may well have them, paying the freight for such part of the voyage as the ship has made, if it please the master. . . . *And this is the judgment in this case.*"

But this process of formation can no longer be traced. Probably no records were kept by these courts. Even of the English royal admiralty court no records are found before A. D. 1520. Of these earlier local courts of sea-law in the sea-towns no annals of their judgments appear to be extant, no collections of plea-rolls, no eye-witness reports of the trials.<sup>c</sup>

## 10. *Legislative Growth*

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Some, however, of the codes exhibit a genuine legislative process. It was a favorite theory of Sir Henry Maine that the judicial process, in history, invariably preceded the legislative, i. e. that the period of code-formulation was preceded by a period of case-judgments. But in the history of the Hansa Towns' Shipping Code, at least, this theory is not verified. We there see a long succession of genuinely legislative enactments, covering three centuries, from a few brief measures of the 1300's, developing by A. D. 1614 into a complete topical code of fifteen chapters and one hundred and three sections, and proceeding constantly by way of legislative amendment, supplement and revision.

The Hansa Ordinance of A. D. 1482 is an interesting illustration of this process.<sup>d</sup> The Ordinance of A. D. 1470 already had some thirty sections. But in A. D. 1481 there was a strong demand to correct certain abuses in seafaring. In March, a meeting of the Hansa shipmasters, held at Bergen in Holland, drew up a list of their troubles; the misbehavior of the mariners (they averred) was making sea-traffic no longer possible; "everyone of these unruly fellows does just what he pleases, and makes so much mischief and trouble for the shipmasters that we shall have to give up sailing the seas unless you gentlemen

### *XIII. Maritime Legal System*

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can do something to alter this." Their list of grievances and proposed remedies read thus:

[*Complaint of the Hansa Shipmasters, December, 1480.*] "These are the complaints and grievances which the shipmasters of the Hansa delivered to the aldermen at Bruges about the mariners, and requested their despatch to the gentlemen of the towns indorsed hereon, so as to obtain remedy and correction thereof:

"I. First, the shipmasters request, from the authority of the gentlemen of the Hansa Towns, that whenever a shipmaster hires his crew for a round-trip voyage, the hire be given in three parts, to wit, the first part when the ship sails, the second part when the ship unloads at the port of destination, and the third when the ship wins home on the full voyage, and that the crew be holden and bound to help unload and ballast, so that it may lie in the stream without danger or risk.

"II. Item, a steersman engages himself to a shipmaster, and whenever it comes to pass that he is not good and competent for what he engaged for, so that the shipmaster's life and ship and the merchant's goods are endangered, it seems proper to the aforesaid shipmasters that to such a steersman should be given no more than half of a mariner's hire and subsistence, provided the shipmaster can make good proof with two good men or with his crew that the steersman was not good enough for what he engaged himself.

"III. Item, likewise, if a mariner engages himself to a shipmaster, and he is not good enough for what he engaged himself, then to such a mariner should be given no more than the half hire and subsistence, provided the shipmaster can prove it as above.

"IV. Item, whenever a steersman or mariner deserts the shipmaster, taking the wages that have been given him, the shipmasters request that such a steersman or mariner be flogged, wherever he

## 10. *Legislative Growth*

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may be found, or that he be branded with a boathook upon his cheek or elsewhere, so that he may be an example to others to avoid such conduct.

“V. Item, it happens that a shipmaster has in his ship one or two of his crew who behave so rascally that the shipmaster must needs lay them off; the shipmasters request that such evil-doers should be given neither hire nor subsistence.

“VI. Item, it happens also that there are some others who join with such evil-doers and lay off with them, to the discomfiture of the shipmaster; the shipmasters likewise request that to such be given neither hire nor subsistence, so as to be an example to others to avoid such conduct.

“VII. Item, it is oft the case that a ship is loaded for a certain port, and that the crew makes mutiny on the sea and sails the ship without necessity or need into another port, against the will of the shipmaster; the aforesaid shipmasters request that to such men neither hire nor subsistence be given before the time when the ship is brought to the port whither loaded.

“VIII. Item, the shipmasters request that the aforesaid gentlemen of the Towns will ordain what shall be given to the crew for their subsistence whenever the shipmaster comes from the east with a cargo of grain, and what the merchant shall give for primage; for the shipmasters and the merchants alike are on this subject much embarrassed by the crews' demands.

“IX. Item, it happens that a shipmaster is loaded for a distant voyage, and the shipmaster from some event of necessity lays up the ship in dock before completing the voyage, and the merchants and the ship's friends decide that the shipmaster must continue the voyage, and the crew will not continue it; the shipmasters request that such persons be given neither hire nor subsistence before the time that the voyage is completed.



### *XIII. Maritime Legal System*

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"X. Item, on these and many more like points, too long to be written, the aforesaid shipmasters request the aforesaid gentlemen of the Hansa Towns to provide remedies and amendments, and to uphold them with heavy penalties and fines, and also to correct and punish the offenders, so as to be an example to others to avoid such conduct."

This memorial was circulated by the Bruges authorities to Danzig, Lübeck, and other principal Hansa towns; and next year, at the Hansa Assembly of Sept. 16, 1481, at Lübeck, the record showed the following consideration given:

[*Hansa Proceedings of Sept. 18, 1481.*] "Afternoon at two of the clock assembled again at the Council House of Lübeck messieurs the aforesaid Councillors Plenipotentiary. . . . .

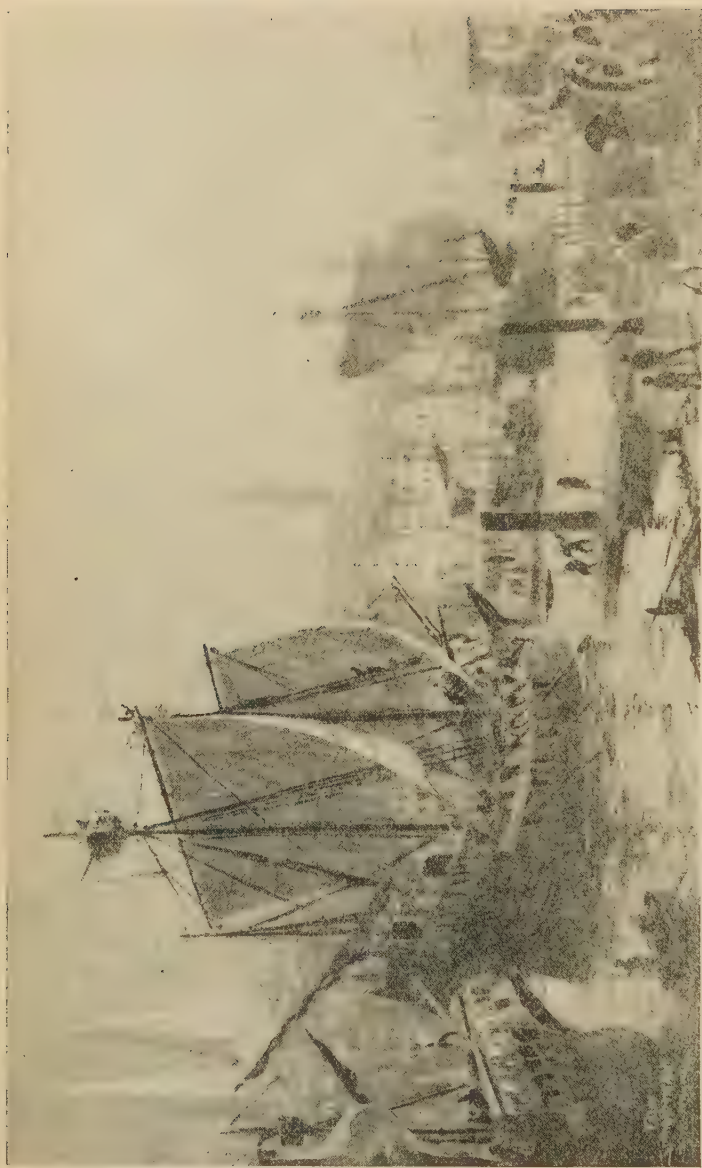
"Par. 36. Then was read a letter of the merchants of Bruges telling of the numerous misdoings of ship-crews, and a document enclosed therewith with proposals for remedying and punishing these misdoings.

"Par. 37. Item, was read a resolution, adopted by the Council of Lübeck, for the correction of the misdoings of steersmen and mariners, and for the punishment of the offenders; which in all its articles, after ample consideration of all articles, was approved, agreed, and adopted by messieurs the Councillors Plenipotentiary.

"Par. 38. Item, it was resolved to send the above-named articles to the Danzig Council, to receive their assent and approval."

After further interim correspondence, the ordinance came up for final action at the assembly of April 22, 1482, held at Lübeck; the record reads:





XIII. 26—THE HANSA FLEET'S HOME-COMING AT LÜBECK

Lübeck was the most powerful city in the League, and its last stronghold. Even under the North German Confederation of the late 1800's, Lübeck retained a semi-independence

## 10. Legislative Growth

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[*Hansa Proceedings of April 22, 1482.*] "In the year of our Lord 1482, at Lübeck, . . . on Monday at eight of the clock at the Council House in the presence of the honorable Council thereof were assembled [naming the delegates]:

"Par. 15. Item, was then read the ordinance and amendments made for the misdoings of mariners, and the revised articles forwarded from Danzig, of which a part was approved and a part altered".

And so, with the labors of the assembly ended, and the fur-robed merchant-princes ("ambassadors plenipotentary" they proudly styled themselves) ready to start homeward in their ships of the Hansa fleet, riding at anchor in the harbor of Lübeck,<sup>26</sup> the ordinance was finally promulgated on May 4, 1482:

[*Hansa Ordinance of May 4, 1482.*] "In the interest of all seafarers and shippers, the honorable merchants of the six Wendish Towns, by their Councillors Plenipotentiary, meeting in assembly at Lübeck in this year 1482, in the name and on behalf of the united Hansa Towns, have proposed, approved, and enacted the following ordinance and articles, which they will cause strictly to be observed:

"I. Item, it is ordained that when a mariner shall be engaged in the Baltic sea or in Prussia, to make a full voyage either to England or to Flanders westward, or to Holland, Zeeland, Friesland or elsewhere, and even to the Gulf, he shall be paid his hire at three periods. When he engages himself, the first part of his hire shall be given him; and when they unload at the port of destination, the second part of the hire; and the third part of the hire shall be given him when the voyage is fulfilled. The mariners shall be bound, after voyage done, to bring the ship into the port and town whence it started, or wherever it pleases the shipmaster to bring it back.

### *XIII. Maritime Legal System*

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"II. Item, the like shall apply to sailors engaged at Lübeck to go to Livland and return to Lübeck or to go to Flanders or to Norway and return to Lübeck.

"III. Item, whoever is engaged for half a voyage, to him shall the half of his hire be given when he sails off and the other half when he arrives.

"IV. And every mariner, whoever he may be, shall be holden and bound to help load, unload, and ballast the ship on which he sails, so that it may lie in the stream without danger or risk, on penalty of forfeit of the hire due to him.

"V. Item, when a steersman engages himself to a shipmaster, and it comes to pass that he is not good and competent for what he engaged for, so that the shipmaster's life and ship and the merchants' goods are endangered, it is ordained that such a steersman shall be given only half a mariner's hire and subsistence, provided the shipmaster can make good proof with two good men or with his crew that the steersman was not good enough for what he engaged himself.

"VI. Item, likewise, when a mariner engages himself with a shipmaster, and he is not good enough for what he engaged himself, to such a mariner shall be given no more than half the hire and half the subsistence, provided the shipmaster can prove it as above.

"VII. Item, when a steersman or mariner deserts the shipmaster, taking the wages that have been given him, it is ordained that, if such person be found, he shall in the first place restore his hire to the shipmaster, and such offence, the first time, shall be punished by the town [authorities] or judge where he is prosecuted, in discretion, according to the circumstances and occasion. If he does it a second time, then he shall be publicly flogged. But if he is found to do it for the third time, then he shall be punished capitally.

"VIII. Item, if any mariners happen to be such rascally evil-doers and have laid off, and united against the shipmaster, so as to



## 10. *Legislative Growth*

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mutiny against him with evil intent and thus to force him, it is ordained that in the first place he shall give back his hire to the shipmaster, and also he shall for the first offence be publicly beaten with rods in the pillory. And if he is found to have done it again, he shall be punished capitally.

“IX. Item, the Towns have resolved that if any steersman or mariner, while at sea, make any evil plots against the shipmaster without need or notable necessity to enter a port where he should not go, so that the shipmaster or merchant suffer damage or loss thereby, or desert the shipmaster without his will and authority, it is ordained that he shall be punished capitally.

“X. [Shipmasters who embezzle and abscond are to be punished capitally.]

“XI. Item, since the customs as to subsistence are doubtful and not uniform, it is ordained the mariners shall be allowed in grain two ‘lasts’ [180 bushels for seven men, and in liquid goods four casks each.

“XI *bis*. Item, the mariners shall be obliged and bound, on penalty of forfeiting their subsistence, to shift the wheat as often as the shipmaster decides and orders; for every ‘last’ they shift, and as often as they shift, they shall have one ‘plack’, and for shaking the straw mats one groschen for every ‘last’.

“XII. Item, if it happens that a shipmaster has loaded for a distant voyage and the shipmaster must by some event of necessity lay up the ship in dock before completing the voyage, and the merchants and the ship’s friends decide that the shipmaster must nevertheless then continue the voyage, and the crew will not so continue, it is ordained that they shall not be given either hire or subsistence before the time that the voyage is completed.

“XIII. [Mariners must assist in case of shipwreck].

“XIV. [Mariners must not go ashore without the master’s consent].

### *XIII. Maritime Legal System*

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"XV. [Mariners' misbehavior prior to sailing].

"XVI. [Mariners' full hire payable if discharged before end of voyage].

"XVII. [Mariner injured when drunk ashore cannot claim his keep; otherwise when injured in the course of duty].

"XVIII. [Mariner too ill to stay on board must be furnished keep and attendance on shore].

"XIX. [Mariner misbehaving may be discharged].

"XX. [Harbor-pilot's duties].

"XXI. [Mariners must aid in repulsing pirates].

"XXII. [Shipmaster failing to resist pirates may be black-listed].

"XXIII. [Master or crew may not accept new position till voyage ended].

"The foregoing is publicly proclaimed on Saturday after Holy Cross Day in the year 1482."

These sea-laws, then, came into being from three sources,—from case-judgments of the local courts, from unofficial treatise-compilations by anonymous scribes, and from deliberate legislation by the sea-guilds. Their common feature was that they represented the customary law of the great community of sea-traders, distinct from any local territorial law of prince or baron.

#### (II) THE NATIONAL LAWS OF THE SEA

11. But with the period of the 1600's a new stage is entered. As time went on, and nations were being organized, this unique common law of the sea was breaking up. The 1600's was the period of nationalization of law all over

## 11. *Nationalization of Sea-Law*

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Europe. The growing sense of nationality was beginning to centralize, unify, and codify, in the name of the royal governments, all the diverse jurisdictions (princes, barons, bishops, cities, guilds) which had hitherto shared in parcels the power of legislation and justice. It was the same movement that in the same epoch was disintegrating and absorbing the Common Papal law (*post*, Chap. XIV) and the Common Romanesque law (*post*, Chap. XV) into the individual national laws. The sea-customs underwent with the rest this process of nationalization.

The process had begun indeed, in the prior century, in Denmark, with Frederic II's Maritime Code of 1561. But it now culminated simultaneously in Denmark, Sweden, and France,—in Sweden with the Maritime Code of Christian XI, in 1667; in France with Louis XIV's Marine Ordinance of 1681; and in Denmark with Christian V's Code of 1683, containing a book on Maritime Law.

Of these, the most influential was that of France, prepared under the great minister Colbert<sup>27</sup> as a part of his comprehensive plan for the nationalization and codification of all French law (*post*, Chap. XV). Colbert's Marine Ordinance, a masterpiece of lucid draftsmanship, based itself on the established customs of the sea, as handed down in the books of customs (revised to suit the



XIII. 27—COLBERT, MINISTER OF FRANCE  
Legislator of the Marine Ordinance of 1681

## 11. *Nationalization of Sea-Law*

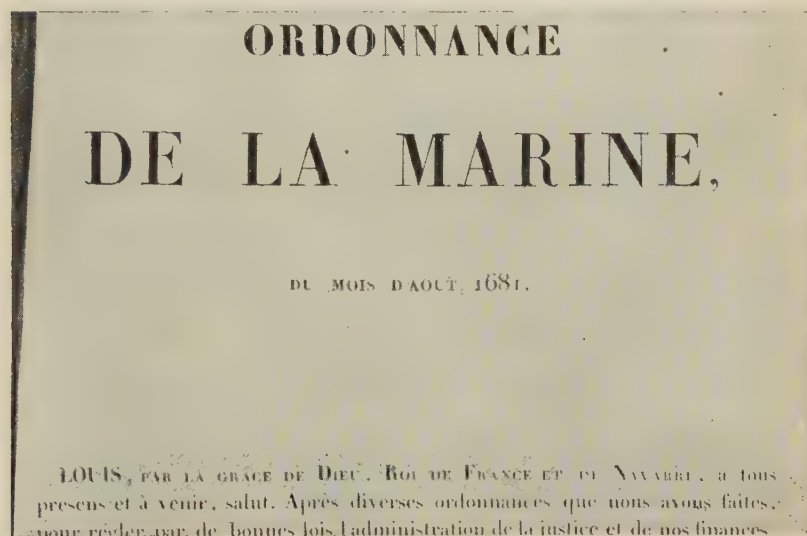
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times). But it now made them French law and enforced them in a royal court of justice,—the admiral's; giving to this court a monopoly of jurisdiction, and ousting the ancient courts of the consuls, elected by the men of the sea.<sup>28</sup> The new national spirit is embodied in the opening clauses:<sup>e</sup>

"I. 1. Justice shall be done in the name of the admiral in all courts of the admiralty.

"2. Nomination of all officers of the court . . . . shall belong to the admiral. . . . .

"II. 2. The jurisdiction of the judges of the admiralty shall include . . . . all actions concerning the commerce of the sea, notwithstanding any agreement or charter to the contrary . . . .



XIII. 28—THE FRENCH MARINE ORDINANCE OF 1681



### *XIII. Maritime Legal System*

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"15. We forbid all . . . . . consul-judges . . . . . to take cognizance of any of the above-named cases,. . . Likewise we forbid all merchants, mariners, and others to bring such causes before them, on penalty of a fine in discretion."

So ended, for France, the common law of the sea and the consular courts of the mariners. Other nations one by one followed in this path,—Holland, in 1721, by the Marine Ordinance of Rotterdam; Prussia, in 1727, by a Marine Ordinance; Spain, in 1737, by the Ordinances of Bilbao; Venice, in 1786, by the Code of Mercantile Marine. In England, between the 1600's and the 1800's, the local sea-courts had been gradually abolished (for some of them tenaciously opposed the tendency), and their jurisdiction was transferred to the admiralty and other national courts.<sup>29</sup> By the 1800's the various national Codes of Commerce, following at intervals the French Code of 1807, had incorporated the maritime ordinances as one of the books within the general codes.

The common law of the sea had disappeared, apparently forever.

#### (III) THE COMMON LAW OF THE SEA, ONCE MORE

12. But the close of the 1800's saw its resurrection in a new form. Today the sea-going vessels of the world number more than 30,000, trafficking to some 300 sea-ports in 60 nations. Each year through the two great



XIII. 29 THE MEDWAY ADMIRALTY COURT, 1932  
This court, with picturesque adherence to tradition, is shown convened on the river Medway, at Rochester. The Tow Clerk is declaring the court open

### *XIII. Maritime Legal System*

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interoceanic canals alone commerce sends more than 10,000 vessels. These figures suggest the importance of seeking uniformity in the rules governing present-day sea-commerce. Sea-transportation has been revolutionized in the past half century. This came about through the advent of steam for transportation and electricity for communication. It affected all stages of shipping,—the building, loading, routing, and unloading, the bill of lading, the sea-risks, the crew, the navigation rules, the harbor-customs, the wharfage, the banking, the brokerage, the terms of sale, and above all the insurance. And all of these distinct but related interests have been more or less standardized by powerful associations whose viewpoint has become international rather than national. The economic conditions of sea-commerce have changed more since 1830 than in all the two thousand years preceding. So that, once more, the maritime group—consisting now chiefly of ship-owners, merchants, and insurers—has found that it is united by vital common interests, overriding the diversity of national laws.

The movement for international uniformity began in the field of insurance against sea-loss,—general average; and a series of conferences resulted in the so-called York-Antwerp Rules of 1890, which codified that subject. The Hague Conference of 1921<sup>30</sup> was the later culmination of

## 12. *Hague Rules of 1921*

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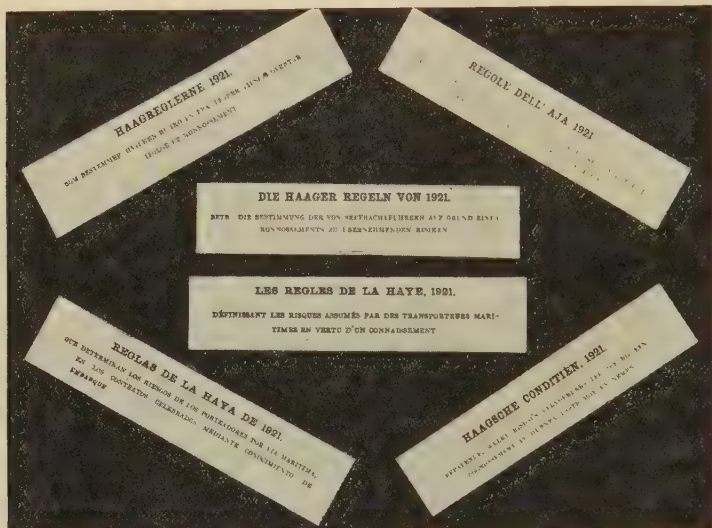
XIII. 30—THE HAGUE CONFERENCE OF 1921

these many forces. Two permanent unofficial bodies, one known as the International Maritime Committee, with branches in many nations, founded at Antwerp in 1897, and the other known as the International Law Association, had been engaged for fifty years in codifying once more the customs of the sea into a single universal body of rules. The codes thus far framed cover general average, ship's liability, ship's mortgage, and carrier's contract. The committees call a conference every year or so in Europe. The most important modern meeting was at the Hague in 1921; American delegates took part; and here



### *XIII. Maritime Legal System*

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XIII. 31—THE HAGUE RULES IN SIX LANGUAGES

the codification of the carrier's contract was achieved. Its provisions became known as the Hague Rules of 1921.

Naturally the agreement of this powerful body on any set of rules amounts to a compulsory rule of mercantile custom for the individual merchant; for when a bill of lading founded on these rules is offered to him, he must accept it, or practically retire from the trade. The text of the Hague Rules, as adopted at the Conference, has been printed in six other great maritime languages,—French, Spanish, Italian, Dutch, German, Norwegian.<sup>31</sup> To ship-owners, shippers, and insurers all over the world they are



## 12. *Hague Rules of 1921*

available in the language of each country; so that they are genuinely international and world-wide. These Hague Rules have now begun to be used in export bills of lading; a bill of 1922, for example, incorporates the Hague Rules in the very first clause; and another clause invokes the entire eighteen articles of the York-Antwerp rules of 1890.<sup>32</sup>

13. Whether these rules will ever become formal law, in all nations, by treaty or national legislation, cannot be prophesied positively. England in 1924 had already enacted some of them. But it is plain that the world has entered upon a new third stage of internationally codified maritime law. This bill of lading, containing the clause just shown, will take a cargo literally around the world, to any of a score of nations, on the terms codified in the document, and virtually independent of any one nation's

### LONDON to NEW YORK, U.S.A.—“Local.”

**Shipped** in apparent good order and condition by.....  
at the port of LONDON, on board the.....  
the goods or packages of merchandise stated to be marked, numbered and described in this bill of lading (measure, brand, contents, quality and value unknown), to be  
conveyed and delivered to.....  
or assigns, at NEW YORK, U.S.A. (or as near thereto as she may safely get), Freight, Charges and Primage payable at.....  
AND IT IS MUTUALLY AGREED AS FOLLOWS:—  
1. **THE HAGUE RULES** :—This Bill of Lading is subject to The Hague Rules, 1921, and the Carrier shall also be entitled to claim and shall have the full benefit  
of all limitations of and exemptions from liability conferred on the Carrier and/or the ship by Public Law.  
\* \* \* \* \*  
2. **GENERAL AVERAGE** :—General Average shall be payable according to York/Antwerp Rules, 1890, and Antwerp Rule, 1908, and shall be adjusted at any port or place  
selected by the Carrier.

### XIII. 32—THE HAGUE RULES IN A BILL OF LADING



### *13. Bill-of-Lading Common Law*

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law.<sup>33</sup> So that a common law of the sea, based on the custom of merchants, is once more returning.

And the national legislatures may now with truth repeat almost the words of the Emperor Antoninus, nearly two thousand years ago, quoted already at the beginning of this chapter: "*We* are indeed the supreme lords of our lands. But Custom is the universal law of the sea".

### XIII. Maritime Legal System

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#### Sources of Illustrations

1. *Queen Hatsheput's Ship, B. C. 1500, in Egypt.* From a photograph, by J. W. Butcher, London, of the relief in the British Museum.
2. *Colonies of the Mediterranean, B. C. 500.* From the map in *Octave Noel, "Histoire de la commerce du monde"*, vol. I (Paris, Plon, 3 vols. 1891).
3. *A Greek Five-Banked Galley.* From the illustration in "*Bilder-Atlas*", vol. IV, plate 1, fig. 1 (Leipzig, Brockhaus, 1875).
4. *Roman Digest; The Lex Rhodia.* From the facsimile reproduction of *Digesta*, XIV, 2, 9, in the Florentine MS., ed. Krüger and Mommsen, in the Laurentian Library at Florence.
5. *Colossus at Rhodes.* From the painting by J. F. Kapkoff, as reproduced in J. A. Hammerton, "*Wonders of the Past*", vol. III, p. 676 (New York, Putnam, 1924).
6. *Amalfi, from the Sea.* From a photograph by E. Ragozino, Galleria Umberto, Naples.
7. *Code of Amalfi.* This facsimile, from the MS. now in the Museum of Amalfi, was furnished in 1933 by Mayor Francesco Gargano of Amalfi, at the request of Professor Giorgio Del Vecchio of Rome. This manuscript has had a romantic history. It was last heard of in the possession of Sanseverino, duke of Amalfi in the late 1300s, and then no mention of it was found, and it began to be thought of as perhaps only legendary. But in 1843 one Thomas Gar chanced upon it in the National Library at Vienna (Cod. 6626). It appeared to have come there as a part of the great library of the Venetian family of Foscari, eminent historians; this library, in 1801, when Austria was overlord of Venice, had been delivered to the government in discharge of a heavy tax, and had been carried to Vienna. About 1921, after the World War, Premier Mussolini sought to obtain its restoration, and an exchange was amicably effected, by the diplomacy of Chief Justice D'Amelio and Senator Salata; the learned Chief Justice has told the story in an article in the *Journal "Diritto Marittimo"*, Vol. VII, Nos. 1, 2, 3, 1929.—The manuscript now reposes once more in the custody of its original possessors, the City Government of Amalfi. The text has been printed by several editors; the latest is N. Alianelli, "*Antichi Consuetudini e Leggi Marittimi della Principalità di Napoli*" (Naples, 1871).
8. *Judgment of the Council of Ten.* From a collection of the originals (obtained at Venice in 1923) in the Elbert H. Gary Library of Law of Northwestern University.

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9. *Gate of Placards*. From a photograph by *Fratelli Alinari*, Venice.
10. *Chamber of the Inquisitors*. From a photograph by *Fratelli Alinari*, Venice.
11. *Bank of St. George*. From a photograph by *Carlo Paganini*, Genoa.
12. *Barcelona*. From the drawing in *E. H. Locker*, "Views in Spain", No. 60 (London, Murray, 1824).
13. *Consulado del Mar*, MS. From a photograph furnished by *Lecuyer*, Paris, of the original in the Bibliothèque Nationale (fol. 1, verso, MS. Espagnol 124).
14. *Consulado*, in Catalan. From the edition of 1523, published at Barcelona.
15. *Consolato*, in Italian. From the edition of 1566, published at Venice.
16. *Consolato*, in Dutch. From the edition of 1704, published at Amsterdam.
17. *Island of Oleron*. From a photograph by *R. Bergevini*, Bordeaux, furnished by Prof. *Léon Duguít*, of the University of Bordeaux.
18. *Laws of Oleron*, MS. From the facsimile in *Sir Travers Twiss*, "Black Book of the Admiralty", vol. I, frontispiece (London, 1871).
19. *Oak Book of Southampton*. From the illustration in *P. Studer*, "The Oak Book of Southampton", vol. I, frontispiece (Southampton Record Society, F. J. C. Hearnshaw, general editor, 1910).
20. *Wisby's Gate*. From the illustration in *Wm. E. Curtis*, "Denmark, Sweden, and Norway", pp. 480, 489 (Akron, Ohio, Saalfeld Publishing Co., 1903).
21. *Hansa Yard at Bergen, Norway*. From a view furnished by *Ben Blossum*, Agent for the Norwegian State Railways, New York (1925).
22. *The Steelyard, London*. From the illustration in *G. W. Thornbury*, "Old and New London", vol. I, p. 31 (London, Cassell, 1873-1886).
23. *Town Council House at Lübeck*. From the illustration in *Helen Zimmern*, "The Hansa Towns", p. 367 (New York, Putnam, 1891).
24. *Hansa Shipping Ordinance*. From the "Lübeck Statuta und Stadt Recht", p. 83 (Lübeck, 1657).
25. *Map of the Shift of Maritime Codes*. Prepared by the author.
26. *Hansa Fleet's Home-coming at Lübeck*. From a lithograph of the painting by *Felix Schwarzmäúdt*, obtained in Lübeck for the author by *Einar Södervál* of Chicago.
27. *Colbert*. From the same source as in Chapter XV.



### XIII. Maritime Legal System

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28. *Ordonnance de la Marine*. From *Becane's* edition of *Valin's* "Commentaire sur l'Ordonnance de la Marine", p. 1 (Poitiers, 1829).
29. *Medway Admiralty Court*. From a photograph by the Acme Newspictures Co. of New York, taken in 1932 (Pla. 194133).
30. *Hague Conference of 1921*. From the frontispiece to the "Proceedings of the Thirtieth Conference of the International Law Association", at the Peace Palace, the Hague, 1921.
31. *The Hague Rules in Six Languages*. From the "Proceedings" (above cited), p. 255.
32. *The Hague Rules in a Bill of Lading*. From a B. L. of the Furness Line, No. 10843 (1922), furnished by *Charles S. Haight*, Esq., of New York.
33. *Round-the-World Bill of Lading*. From a B. L. of the Canadian Pacific Co., Form 1227, Correction 3.

#### *Sources of Documents Quoted in Text*

- a. Passage from the Consulado del Mar. From the translation in *Twiss*, "Black Book of the Admiralty" (cited *infra*), vol. III, p. 187.
- b. Passage from the Ordinance of Valencia. From the French translation in *P. B. Boucher*, "Consulat de la Mar", vol. II, p. 1 (Paris, 1801).
- c. Judgments of local sea-courts. There are indeed some interesting records (complaints, answers, arbitrators' decisions) of disputes between the towns in the proceedings of the Hansa Assemblies (e. g. "Hanse-Recesse", cited *infra*, 1st ser., vol. I, No. 141, No. 161, No. 211, and "Hansisches Urkundenbuch", vol. VIII, Nos. 110, 111, 164-167, 1150, 1255) and occasionally these disputes concerned matters of sea-law ("Hanse-Recesse", *supra*, Nos. 548-554). But these were rather quasi-international negotiations, in which the officers of one town or nation made claim against those of another for wrongs suffered by the individual citizens of one at the hands of those of the other. In *Alianelli's* "Leggi Marittimi" (cited *supra*), at p. 89, a footnote reports that in the Naples newspaper "La Patria" of April 9, 1870, someone announces that "at the forthcoming International Maritime Exposition will be shown a book containing a collection of unpublished judgments of the court of admiralty of Amalfi". This would indeed be a treasure,—the earliest sea-judgments extant. But inquiries in qualified quarters have thus far failed to locate the book.

Hansa Ordinance of 1482. Translated from the old German in *Dietrich Schäfer*, ed. "Hanse-Recesse", 3d ser., vol. I, Nos. 317, 318, 334, 357, 365.

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- 367 (Leipzig, 1881); the ordinance-text is also translated into French in *Pardessus* (cited *infra*), II, 497.
- e. Passage from the Ordonnance de la Marine. From the French text in Becane's edition of Valin's Commentary (cited *supra*), p. 2.

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*F. R. Sanborn*, "Origins of the Early English Maritime and Commercial Law" (New York, 1930).

*H. C. Gutteridge*, "The Unification of the Law of the Sea" (J. of Comparative Legislation and International L., 3d ser. 1932, XIV, 246).

*Charles M. Andrews*, ed. "Records of the Vice-Admiralty Court of Rhode Island" (historical introduction on early admiralty in the Colonies; vol. III of American Legal History Series, 1935).



THE  
PAPAL  
LEGAL SYSTEM





## XIV

### *The Papal (or Canon) Legal System*

1. The early claim of universal jurisdiction for St. Peter's successor—Extension of the Church's rule from the Balkans to Greenland.
2. The judicial and legislative system—The Cardinal Chancellor—The Sacra Romana Rota—An Opinion by Coccinus—The Consistory and the Congregations.
3. Compilation of the recorded sources—The Decretum of Gratian—The rise of Canon Law as a system—Doctor Johannes Andreae.
4. The Decretals of Pope Gregory IX—A Decretal invalidating a usurious mortgage—A Decretal regulating criminal procedure.
5. The Corpus Juris Canonici—Pope Innocent III, the great legislator—Culmination of the Church's sway under Innocent III.
6. The Church courts—Their extensive and progressive influence—St. Ives, the Church judge and patron saint of the legal profession.
7. Rise of nationalism undermines the Church's political authority—The Council of Trent—The statutes of Henry VIII—Absorption of the Papal jurisdiction by national courts and legislatures.
8. Codification of the Papal Regulations in 1917—The Codex Juris Canonici.



XIV 1—MAP SHOWING THE PAPAL JURISDICTION A. D. 1200  
The shadings represent merely various subdivisions

## XIV

### The Papal (or Canon) Legal System



HE Bishop of Rome was early recognized as the successor of Saint Peter, whose bronze statue stands in the Vatican. That Bishop under Latin Christianity was given the title of Pontifex Maximus, a title already familiar in the pagan priesthood. And, in the course of time, the successor of Saint Peter began to claim universal jurisdiction of law, not only over the Christian Church, but also over temporal kings and princes. The typical expression of this claim is found in a supposed letter of Pope Clement I, A. D. 91, addressed to the clergy, and later included in the so-called Decretals of Isidore; the vital clauses read:<sup>a</sup>

“Your duty is to teach the peoples. Their duty is to obey you as they would God Himself. . . . And all princes, high or low, and other peoples, tribes, and languages, who do not obey shall be infamous, and shall be cast out from the kingdom of God and the company of the faithful.”

These words described during some centuries the dominance of the church's supreme jurisdiction over morals and faith. This quasi-Federal jurisdiction of the church had its own tribunals (like the American Federal ones) for its own special field, alongside the other courts; but it claimed and received a supreme appellate political

#### *XIV. Papal (or Canon) Legal System*

jurisdiction over all temporal kings and kingdoms, with the Pope as Pontifex Maximus, judging all men, and judged by none.

From Serbia on the east to Iceland and Greenland on the northwest extended the jurisdiction of this theocracy.<sup>1</sup> Its sway was at the zenith in the centuries A. D. 800-1200; it ended by four hundred years later, and it had begun four hundred years earlier,—twelve centuries in all.

The early papal letter of A. D. 91, above quoted, dating this charter of supremacy back to early Christianity,<sup>2</sup> was

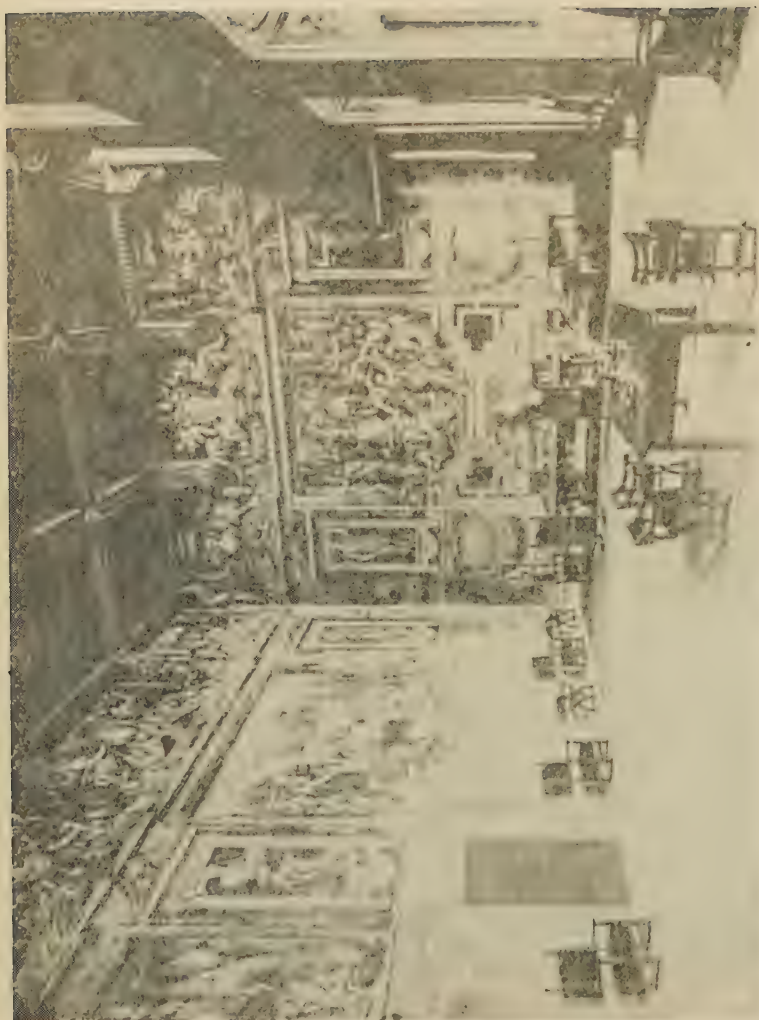
ihū xpi. hęc pcepta a scō pētro apōlo ācepi. et sic hūc instruire curam. ut  
seruari omnia pcepta sine macula. Si quis audierit te: talis erit minister  
xpi ihū. Qui autē non audierit te: immo loquente dñi pte: ipse sibi dāpnā.  
tionem accipiet. Omnis dñs hūc sūa te ptecone custodiat. atq; ad cel dñs  
renūciationē patris cū multiplici annuarū fructu pducāt. Nō te uerū  
utiq; incolumē custodiat reuerentissime fr̄. amen. **C**IVIS SVPR  
LEAEVS urbis romę ep̄s: omib; coep̄is: p̄b̄is: diaconib;: AD VNIVERSOS.  
ac reliq; denarij. & cunctis p̄ncipib; maiorib; minorib; ue omib; q; genera-  
lit̄ fideib;: Benedictio claritas & gl̄a in gr̄a dī que data est nob in xpo ihū  
dño nro. Viget nos fr̄simul? amor n̄r & religiosa inuicē deuotio qua  
deuotē sum? ut quidā uob scribam? Vob q; qm̄ sacerdotio dñi summi &  
insp̄cula estis positi. plus sēt oportet ut subditos uob poplōs pleniter  
docere possitis: et q; ad regna cēlorū ducatū p̄be dño annuente ualeatis.  
Vnde & ipsa p̄se uertat̄ ait: Uob datū est nosse misterīū regni dī: q̄tis saute  
in parabolis: & r̄lā. Propt̄ qd consiliū dōmiciuq; ur̄m constantē docere uerba  
diuina & ediscantib; libenter accommodare aures uerbo dī. Vt in enī q̄ legatione  
xpi fungimur: est docere poplōs: et nō est obp̄ire dō. Si autē uob ep̄is  
inobediēte om̄s p̄b̄r. diacon. ac subdiacon. & reliq; denarij cuncti. om̄s q;

#### XIV. 2—LETTER OF POPE CLEMENT I

"The peoples' duty is to obey you as they would God Himself"

WIG-67





XIV. 3—PALACE OF THE CANCELLERIA

## *1. Early Papal Supremacy*

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false, the words having been forged (long after that date) by an obscure medieval monk, as was discovered many centuries later. Nevertheless, as early as A. D. 400 Pope Damasus had begun to claim papal supremacy; and the Roman Emperor Valentinian III, in a decree of A. D. 445,<sup>b</sup> had acknowledged the claim of Leo I, Bishop of Rome, to be the supreme judge, at least over the universal church.

2. Today, in Rome, at the very spot of earth where Pope Damasus, fifteen centuries ago, once held his court of justice with pomp and ceremony, stands the superb Palace of the Cancelleria, or Papal Chancery.<sup>3</sup> This is the office of the Cardinal Chancellor of the papal church; he is the most powerful dignitary next to the Pontiff himself; he carries the sceptre of justice, and signs all papal decrees issued under the famous lead-seal (technically known as "bull").

In a more modest chamber meets the once supreme civil tribunal of the papal church, the *Sacra Romana Rota*, or Holy Roman Wheel.<sup>4</sup> This court was termed, "*Totius Christiani orbis supremum tribunale*", "the supreme tribunal of the whole Christian world". In its most flourishing period, the 1400's and 1500's, it was deemed (in the words of a modern German scholar) "the most eminent and weighty court in the world." The

#### *XIV. Papal (or Canon) Legal System*

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meetings of the Rota were (and are still) held in private. The tribunal was called Rota, or wheel, because (as some say) originally its judges sat around a table in a circle, or, because cases were assigned in rotation to each judge. Its jurisdiction being so extensive and cosmopolitan, its membership (finally fixed at twelve) was required to represent the varied regions within the church's fold; the allotment was: three from Rome, two from Spain, and one each from Germany, France, Venice, Milan, Ferrara, Tuscany, and Bologna. Emperors and kings once brought their



XIV. 4—CHAMBER OF THE SACRA ROMANA ROTA  
This photograph was taken in 1923, by special permission  
of the Papal authorities



XIV. 4a—THE SUPREME LAW COURT OF THE PAPACY, 1932





## 2. *The Sacra Romana Rota*

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causes to the tribunal of the Rota; but since the loss of the church's temporal power, the Rota's jurisdiction has become a minor one.<sup>4a</sup>

Hundreds of tomes now form the six centuries' accumulation of the Rota's opinions. Usually they were published as the collected opinions of some individual judge. Penia and Coccinus were eminent Deans of the Rota in its palmier days,<sup>5</sup> the former in the 1500's, the latter in the 1600's. John Baptist Coccinus held that high office for twenty-eight years; his opinions numbered about fifty a year. They are seldom lengthy; and the following one, from the first of his five large volumes, is typical of their style (the headnotes are by the judge's editor, and they reveal that the art of elaborate headnotes is no invention of the modern reporter):<sup>c</sup>

[*An Opinion of Coccinus, Dean of the Rota.*] "Rome: The Bull 'Juris Congrui'.

"Monday, 5 June 1600.

"*Topic:* The owner of a plot or house, intending to build, is not compellable to sell by virtue of the Bull 'Juris Congrui'.

"*Summary:* 1. No one against his will is compelled to sell. 2. The owner of an estate, intending to build, has priority over others wishing to build. 3. The Bull 'Juris Congrui' declares only the general principle that an owner may be compelled to sell against his will. 4. When a remedial measure could have one or two effects contrary to existing law, it is always to be interpreted so as to do least change to the common law. 5. Size and proximity of



XIV. 5—PENIA AND COCCINUS  
Former Deans of the Rota, i. e. Chief Justices of the Supreme Court

## 2. *The Sacra Romana Rota*

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premises are immaterial in building by the common law; otherwise, by the terms of the Bull 'Juris Congrui'. 6. For the owner not willing to sell, but intending to build, a time-limit should be set for his building."

"*Opinion.* John James Ferrari, alleging that he wished to build for the beautification of the city, petitioned for the sale to him, pursuant to the Bull 'Juris Congrui', of an adjacent building of the German College; the College replied that it also intended to build for the beautification of the city, to the full area of its ground.

"The case being submitted to me from the Rota, I doubted whether the said James could compel the College to sell the said house. And the other members of the Rota were of opinion that the College was not compellable. The ground of this opinion was a former decision of 15 June 1579 [citing the reference]. For in law there are two distinct and fundamental principles in favor of owners: [1] one is that no one is against his will compellable to sell (lex 'dudum', statute 'de contrahenda emptione'); [2] the other is, that in equal circumstances an owner has priority over all other persons wishing to do the same thing (lex 'si cum dotem', § finalis, ss. 'solutis matrimoniis', lex 'ex facto', ss. 'de peculio', Caputaquis, Decisio 99).

"[3] Hence, this Bull, which declares only the general principle that an owner *may* be compelled to sell, contrary to lex 'invictam' and the above-cited lex 'dudum' in the statute 'de contrahenda emptione', alters the common law on that point only, and on others, not covered by it, must be deemed to refer to the common law and to receive from the same its interpretation. For [4] when a remedial measure could have one or two effects contrary to existing law, it is always to be interpreted so as to have one effect only and to do least change to the common law [citing authorities]. And therefore the Bull does not change the common law that when an owner, here the College, intends to build, he cannot be compelled to sell.

#### *XIV. Papal (or Canon) Legal System*

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"[5] The greater area and proximity of the land to Ferrari, etc., is immaterial; those circumstances would be material if the case came within the above statute; but do not affect the result here, where we are governed by the rules of common law.

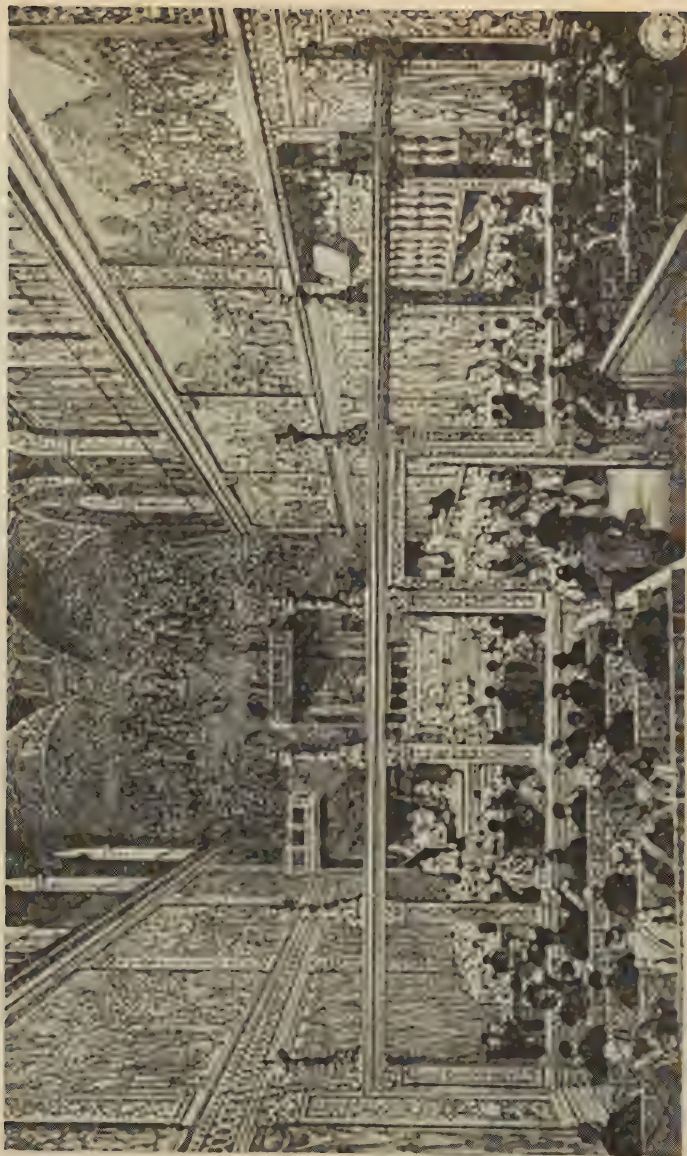
"[6] Nor does it suffice to argue that the statute is rendered elusory by our decision because the owner [whose land is sought] could always set up that he intended to build; for a time-limit must be set for such building, after the lapse of which this house may be proceeded against, according to the form of the said statute."

Most cases of church litigation are now dealt with by a Committee of the Cardinals, known as the Congregation of the Council, because it interprets the fundamental laws passed by the Council of Trent, the last universal church assembly. This Congregation now has its office in the Palace of the Chancery, already shown.

The supreme advisory legislative tribunal used to be the Consistory of Cardinals, or Senate of the Church, the Pontiff presiding; sometimes a Consistory was held in the Sistine Chapel, with Michael Angelo's world-famous fresco on the wall over the altar.<sup>6</sup> But the Consistory now reserves for itself only matters of highest moment, and delegates its various powers to the Congregations, or Committees, already mentioned.

3. The legislation and decisions of the Popes, after accumulating for seven centuries in thousands of separate decrees, rescripts, bulls, and council-resolutions, were first





XIV. 6--A CONSISTORY IN THE SISTINE CHAPEL

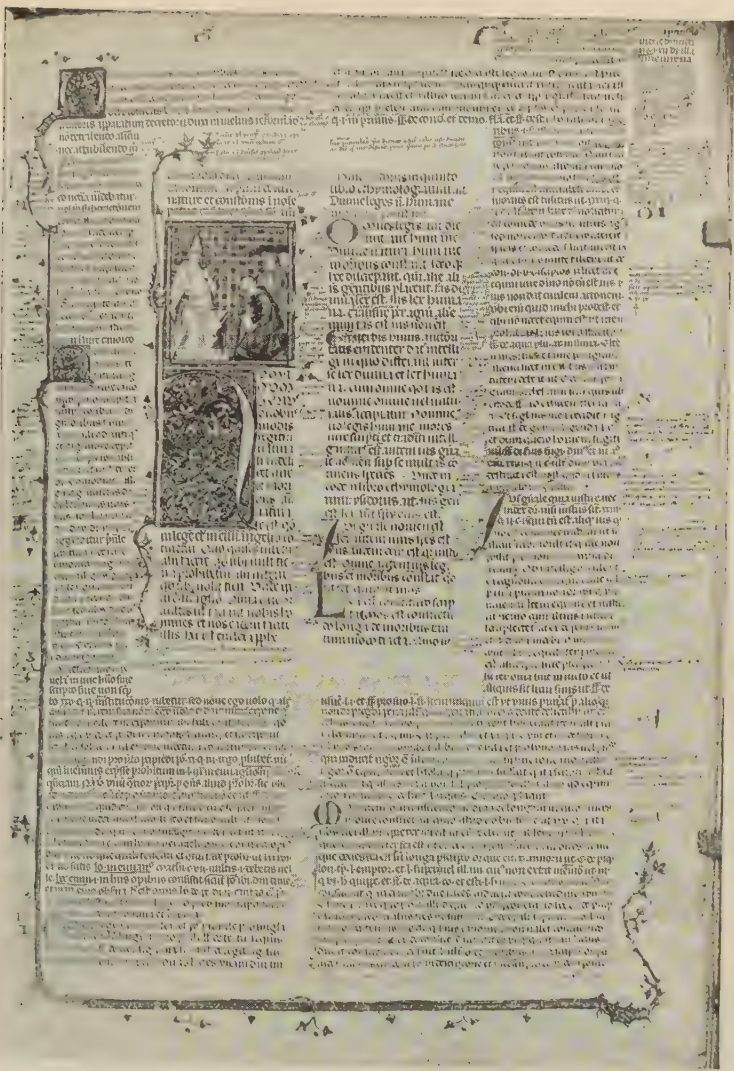


#### *XIV. Papal (or Canon) Legal System*

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systematically digested in the so-called Decretum of Gratian,—a private compilation made about A. D. 1140, by an obscure monk named Gratian, at the University of Bologna.<sup>7</sup> Twice in history the growth of the papal supreme jurisdiction received a powerful impulse from literature; the first impulse was given by the forged Decretals of Isidore, in the 800's, already mentioned; and now it took place a second time, in this Decretum,—one of those great text-books which by appearing just at the right time and the right place, becomes universally revered as equal to law. Gratian's huge labors of search and sorting brought clarity out of chaos, and now first made these materials available for ready reference by all. The Decretum virtually created Canon (or papal) law as an independent system. Exalting the papal authority, it met papal favor. The Emperors were favoring the then recently resurrected imperial law of Rome (*post*, Chap. XV); and so the Popes, in their rivalry with the Emperors, welcomed the strong legal support found in the Decretum.

Canon law now began to be taught in the newly arisen universities (*post*, Chap. XV), alongside of the Roman law of Justinian; and the degree of J. U. D. ("juris utriusque doctor") came into use as signifying a master who had compassed both branches of law. The tombs of these doctors of Canon law show that their fame



XIV. 7—DECRETUM GRATIANI  
This compilation virtually created Canon, or Papal, Law  
as an independent system



XIV. 8.—TOMB OF JOHANNES ANDREA, DOCTOR OF CANON LAW

### 3. *Gratian's Decretum*

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equaled that of the other branch. One of the most eminent, Johannes Andreae,<sup>8</sup> a professor at the University of Bologna, in the early 1300's, was so well-beloved in Bologna that when the University by an ordinance forbade any member of the University to become godfather to any family of Bologna citizens, it made a special exception in favor of Andreae and all his descendants forever. Andreae bestowed upon his youngest and favorite daughter the name "Ordinancy" ("Novella"); and she is recorded to have been so learned in the law that sometimes in his absence she occupied his chair and lectured on the Canon law—but behind a curtain, lest her beauty distract the students' attention!

4. Gratian's Decretum was given official sanction by Pope Gregory IX, in the next century, A. D. 1234, by an extensive supplement, known as the Decretales, or Decretals.<sup>9</sup> This new work, the Decretals, was an official compilation, and was required to be taught in all universities. It was prepared, under direction of the Legislator-Pope Gregory IX, by Raymond of Pennafort, one of the judges of the Rota, or Supreme Court. In point of system, it marked a decided advance on Gratian's work; its two thousand paragraphs were arranged in books, titles, and chapters (really, sections), under a more



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XIV. 9—POPE GREGORY IX ISSUING THE DECRETALS

#### 4. Gregory's *Decretals*

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synthetic classification,—a forerunner of our modern digests.<sup>10</sup>

The following passages illustrate the materials used:<sup>d</sup>

[*The Decretals; Book III, Title XVII.*] "Sale and purchase: *Chap. I* (Resolution of the Council at Valencia):

"It was resolved, by us and our faithful associates, that the elders admonish their people that they be hospitable and do not refuse lodging to any traveler, and that, to remove all chance of extortion, they do not sell at higher price to the passer-by than they could sell in the market; and that the passer-by, if not so treated, report to the elder, so that by his order they may sell humanely."

. . . . .

[*Ibid, Chap. V.*] Innocent III to the Bishop of Pallia [A. D. 1203]: "It has lately come to our hearing, when R. a layman sought a loan from M., that the creditor, a man of the diocese of Trani, lest he be later brought into conflict with the canon against usury, received some houses and olive-groves of the said R. under terms of a sale, although the transaction was in fact an usurious contract, which appears plainly from the circumstance (set forth in the notarial instrument) that the creditor promised the debtor that he would restore the houses and olive-groves whenever between the seventh and ninth years thereafter the debtor should pay forty ounces of Tarenian money, which amount to scarce one-half the fair value. Therefore, since fraud cannot be condoned in any one, we order your fraternity, by virtue of the apostolic scriptures, that if the facts are as above, viz. the deed of sale was executed in evasion of the canon against usury, you compel the said M., under penalty as prescribed by the Lateran Council against usury, to restore the said houses and olive-groves to him to whom they may now belong by inheritance, the borrower himself having perhaps now gone the way of all flesh."

#### *XIV. Papal (or Canon) Legal System*

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And the following passage has a deep intrinsic interest for the modern lawyer, even yet; for this Canon formed the main starting-point for the church's method of criminal prosecution—the so-called “ex officio” or inquisitorial method—which set the model for all later Continental procedure, in contrast with the old Germanic “accusatory” method—the method of individual complaint—which survived in England until modern times:

[*The Decretals: Book V, Title I.*] Prosecutions: Chap. XXIV. Innocent III, in General Council at the Lateran [A. D. 1215]: “How and when a prelate should proceed to investigate and punish the offences of his subordinates is plainly to be gathered from the authorities of the old and the new Testaments, on which later the canonical sanctions were founded, as we have already publicly pointed out, and which we now confirm by authority of the holy Council. For it is written in the gospel that the steward, who was reputed to his master to have squandered the estate, heard these words from the master: ‘How is it that I hear this of thee? Give an account of thy stewardship, for thou mayest no longer be steward’. And in Genesis the Lord said [of Gomorrah], ‘I will go down and see whether they have done altogether as the cry which comes to me’. From which authorities it is plainly proved that, not only when a subordinate, but also when a prelate has sinned, if it has come to the ears of his superior by clamor and repute [clamorem et famam]—not indeed of the malicious and loose-tongued but of the serious and honorable, nor once only but often, which the clamor and the repute will show—then the truth should be diligently inquired into before the elders of the church. . . . The party should be present, against whom the inquisition is to be made (unless he contumaciously absents himself). The items of charge, on which the inquiry

#### 4. *Gregory's Decretals*

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is to be made are to be explained to him, so that he have opportunity to defend himself. And not only the sayings, but also the very names of the witnesses are to be made known, so that it may appear what was said and by whom. Nor are his lawful impeachments and rebuttals of them to be rejected, lest by suppressing the names of the detractors or not listening to the grounds of impeachment encouragement be given to bold defamers. . . . . Now as there are three methods of proceeding, viz. by complaint, by information, and by interrogation [inquisitio] of the parties themselves, nevertheless diligent caution must be used in all three of them, lest a too ready haste result in grave injustice; so the method of lawful complaint [by an injured party] must be preceded by a written statement; the method of information must be preceded by an earnest warning [to the informer]; and the method of inquisition by a clamorous rumor [clamosa insinuatio]."

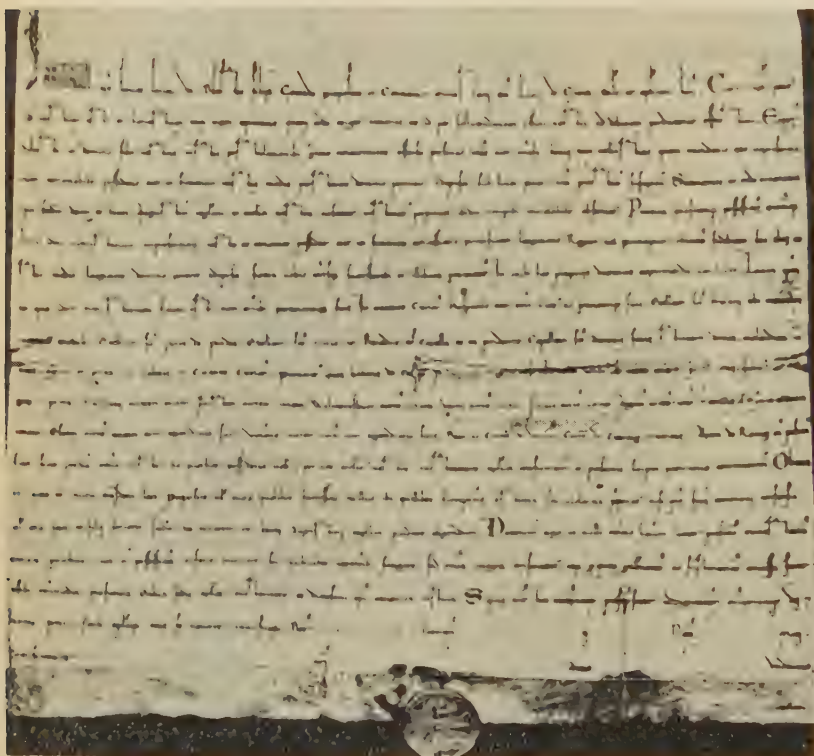
These two works, the *Decretum* and the *Decretales*, with some later supplements, were edited in A. D. 1582 (after the reformatory legislation of the Council of Trent, A. D. 1563), at the command of Gregory XIII, by a commission of six cardinals and fifteen doctors of law, and this compilation was officially entitled "*Corpus Juris Canonici*". This work, in various printed editions, remained the universal basis of papal law into modern times, until a few years ago. To the law up to the time of Gratian's *Decretum* was commonly given the epithet "*jus antiquum*"; to the ensuing law up to the Council of Trent, "*jus novum*"; and to the later law, "*jus novissimum*".

5. But the real credit for the great compilation of Gregory IX must be given to another papal legislator, the



#### *XIV. Papal (or Canon) Legal System*

most famous one—Pope Innocent III, who died A. D. 1216, just before the Decretals of Pope Gregory appeared. Innocent III was a prolific legislator; in his reign of eighteen years he had himself issued some thirty-four hundred decrees.<sup>11</sup> Innocent III had planned to systema-



XIV. 11—A BULL OF INNOCENT III

This decree, or bull, is a grant confirming a monastery in its possessions. The leaden seal ("bull") is seen at the bottom





XIV. 12—POPE INNOCENT III

## 5. *Innocent III, the Legislator*

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tize the church's enormous accumulation of law; but he did not live to execute the plan.

Innocent III was perhaps the youngest man ever elected Pope, being then only thirty-seven years of age. The best portrait of him<sup>12</sup> shows the youthfulness of the face, which is in unique contrast to portraits of the other Popes. Innocent III was the ambitious and masterful autocrat who humbled the English King John for signing Magna Carta, and who reduced England, for a short period, to be only a vassal of the papacy; he annulled Magna Carta, declaring it vile and base. In his day he named emperors and tamed kings. He excommunicated whole nations. He established the inquisition of heresy, by warrants extending into every corner of Europe,—a form of terrorism which served to extirpate those who dissented from the church's dogmas for the next four centuries; indeed, as late a date as 1793<sup>13</sup> is found on a mandate of the Holy Inquisition, chanced upon in Madrid; the mandate authorizes the Inquisitor to use "arms offensive and defensive", and makes him immune from interference by the regular courts.<sup>o</sup>

It must be remembered, in speaking of him as legislator and judge, that Innocent represented, in legal theory, a one-man autocracy. Even at the present day, when the Roman church is politically only a religious group, Catho-

#### *XIV. Papal (or Canon) Legal System*

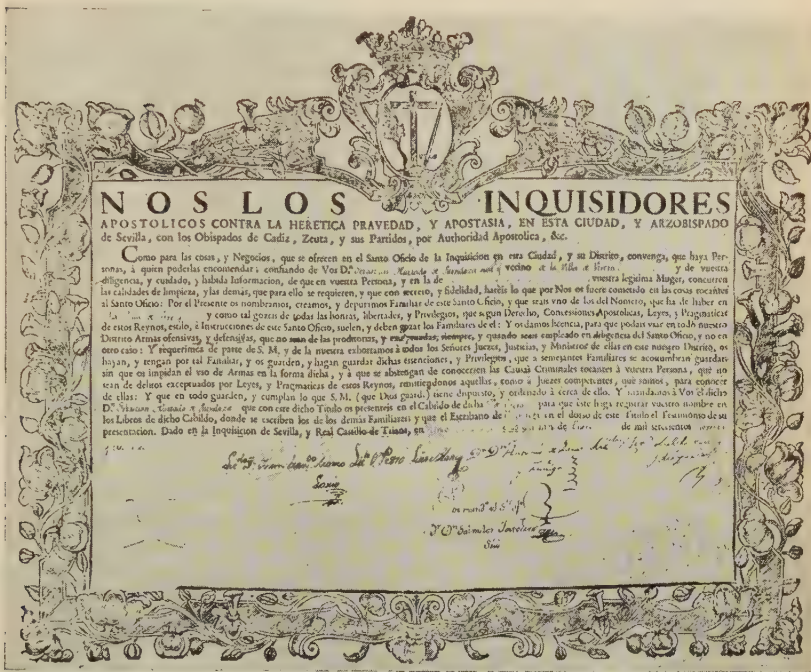
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lic jurists speak of the Roman pontiff as "the supreme teacher, law-giver, and judge" over the religious affairs of all within the faith. But in Innocent's day the Roman church was vastly more than that; it claimed and possessed supreme temporal political power over the entire Christian world. Rome was once more the mistress of Europe, and kings were its vassals. Its clergy were immune from the criminal justice of the state. Its legislation covered the whole of human existence from the cradle to the grave; it was upheld by penalties that neither the proudest monarch nor the humblest peasant could escape; and it was administered by a supreme world-judge responsible to no earthly superior for his actions.

It was a church court, presided over by the Pope's delegate, which tried for heresy Galileo Galilei,<sup>14</sup> the world's greatest scientist of the day, just three centuries ago; and it was a church court which later imprisoned him and threatened him with torture until he recanted his great scientific proposition that the earth moves around the sun and not the sun around the earth. It was a church court which tried for heresy one of the most heroic patriots in the world's history, Joan of Arc:<sup>15</sup> her devoted leadership had saved the French kingdom from dissolution; but after a trial lasting three months, regularly held by clericals under a warrant of



## 5. Innocent III



### XIV. 13—A MANDATE OF THE HOLY INQUISITION

This was found in Madrid, and is dated A. D. 1793, long after the disbanding of the Holy Office elsewhere

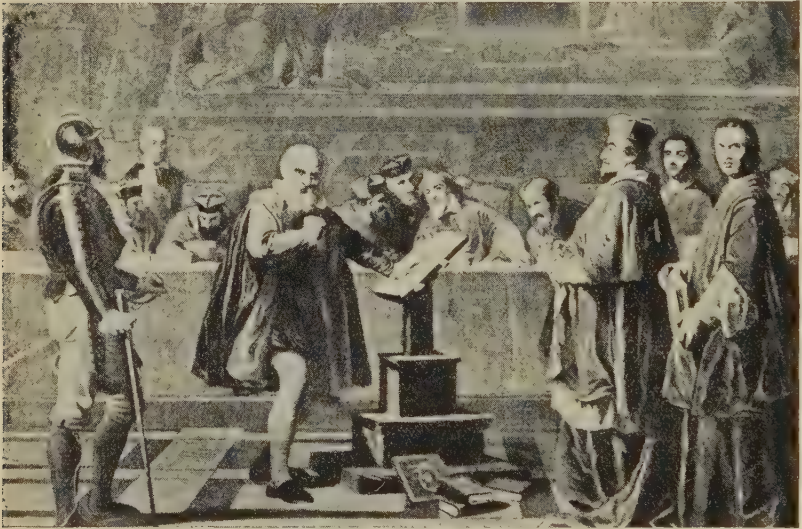
inquisition for heresy, sitting in a chapel, and presided over by a bishop, she was found guilty of heresy, and was later burned at the stake.

6. The church courts, it must be remembered, were, in those days, not only as important as the secular courts in the daily life of the peoples of Europe; but they rendered invaluable service to the cause of justice. Secular

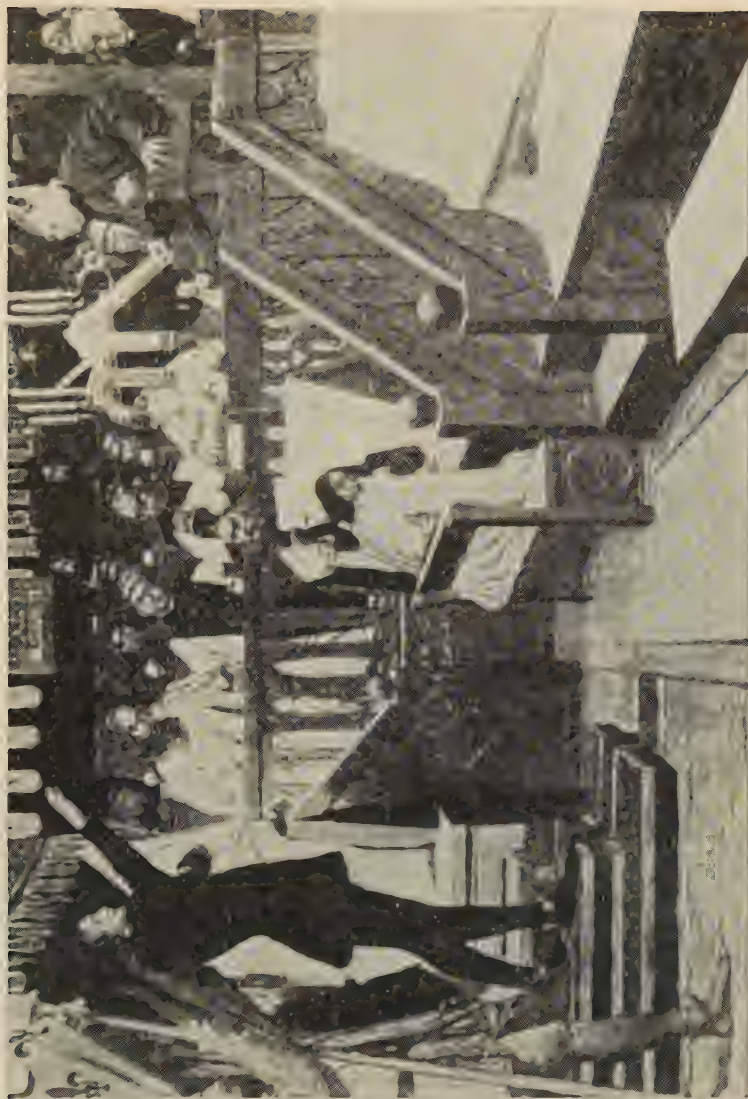
#### *XIV. Papal (or Canon) Legal System*

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justice, administered chiefly by hundreds of petty independent barons and princes, was local and weak, selfish and mercenary, crude and unprogressive (*ante*, Chap. XII). The church's law then represented the progressive and efficient methods of the period. The church forbade the irrational "trial by battle", or legal duel, which was still in common use in the secular courts. The church revolutionized criminal and civil procedure in western Europe; and the modern Anglican chancery practice can be traced directly back to Innocent III's institutions. The church laid the foundations of inter-



XIV. 14—GALILEO BEFORE THE INQUISITION



XIV. 15—TRIAL OF JOAN OF ARC



#### *XIV. Papal (or Canon) Legal System*

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national law; for before men were ever Frenchmen or Englishmen they were Christians, and the modern so-called law of nations began by being a "jus inter christianos". The church's theory led up to the conception of the modern State as a power held in trust for the welfare of the nation, superseding the feudal idea of government as a property-right of the ruler. The church first in Europe laid down the modern principle of equality before the law; it protected the poor and the weak against the

rich and the powerful.



XIV. 16—STATUE OF ST. IVES

He stands between a rich magnate and a poor peasant, signifying equal justice for all

A famous statue, showing the judge standing impartially between the rich man and the poor man,<sup>16</sup> represents Ivo, or St. Ives, an ecclesiastical judge in Brittany, of A. D. 1300, around whom cluster the most admirable traditions of our legal profession.

## 6. *The Church's Justice*

The statue stands on a pillar in the church in his native township of Tréguier, in Brittany. At Rome there is a chapel in honor of St. Ives; the inscription over the door calls him "advocatus pauperum", "the poor man's lawyer". Among the classical painters a favorite theme was St. Ives on his judicial bench receiving the petitions of children. He is the chosen saint for the University at Rome; in the chapel of the Sapienza ("Learning"; the old name for the University) a spacious mural painting depicts St. Ives, clad in



XIV. 17  
ST. IVES ATTENDING TO THE  
PETITIONS OF THE POOR

This painting fills the chancel-wall of the chapel of the Sapienza (University) at Rome

his lawyer's robes, benevolently attending to the petitions of the poor<sup>17</sup>; and on his death-day, the 19th of May, each year a memorial mass is here celebrated. In Brittany his court was thronged with suppliants for justice; a favorite saying of his, when pronouncing judgment, was, "Bon droit et raison", "This is good law and equity". The popular verdict on his character shames the repute of our



#### *XIV. Papal (or Canon) Legal System*

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profession; for the saying ran, of him, “Advocatus sed non latro, res miranda populo”, “He was a lawyer, yet not a rascal, and the people were astonished”. On his death he was proposed for canonization as a saint; and every Faculty of Law in Europe, as well as a host of kings, barons, and lesser men, joined in the petition. He is reputed to be the only lawyer who was ever made a saint.<sup>f</sup>

His tomb, in the churchyard at Tréguier, in Brittany, is sought by pilgrims, hoping for his protection,<sup>18</sup> even at this day, six centuries later; the suppliants ensure



XIV. 18—PILGRIMS AT THE TOMB OF ST. IVES  
The tomb is in the churchyard of St. Minihy, at  
Tréguier, Brittany, his native place



XIV. 19a.—MEMORIAL WINDOW  
TO ST. IVES IN THE  
CATHEDRAL

This window was installed in  
1936 on behalf of many Bar  
Associations, National, State,  
City, and County, of the  
United States



## 6. *The Church's Justice*

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XIV. 19—A FOREIGN LAWYER AT THE TOMB OF ST. IVES

their prayers by creeping on their knees through the arch of the saint's tombstone, and they confidently appeal to him to do justice and send retribution on their enemies. Even a foreign lawyer may sometimes be found making a pilgrimage to the grave of this patron saint of the legal profession,<sup>19</sup>—this humble judge of the church court, who once made the name of Law synonymous with Justice throughout Europe.<sup>19a</sup>

7. But meantime, as the thirteenth century ended, the principles of patriotic nationality and legislative independence were rising and growing slowly stronger through-

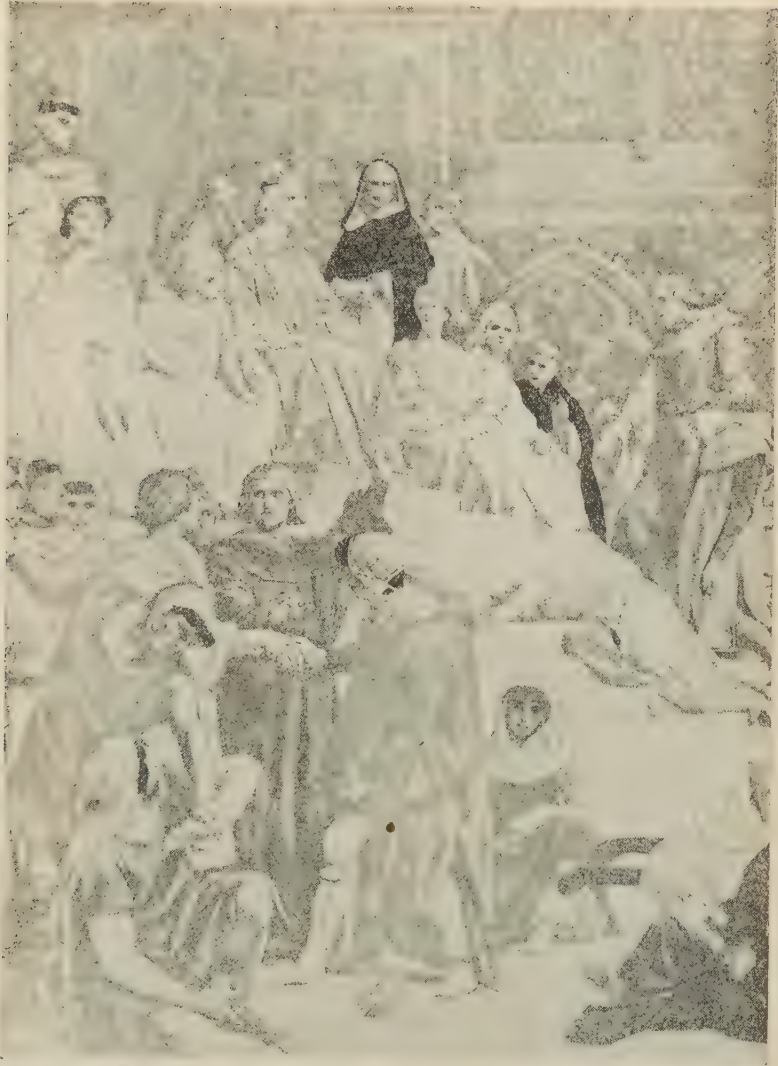
#### *XIV. Papal (or Canon) Legal System*

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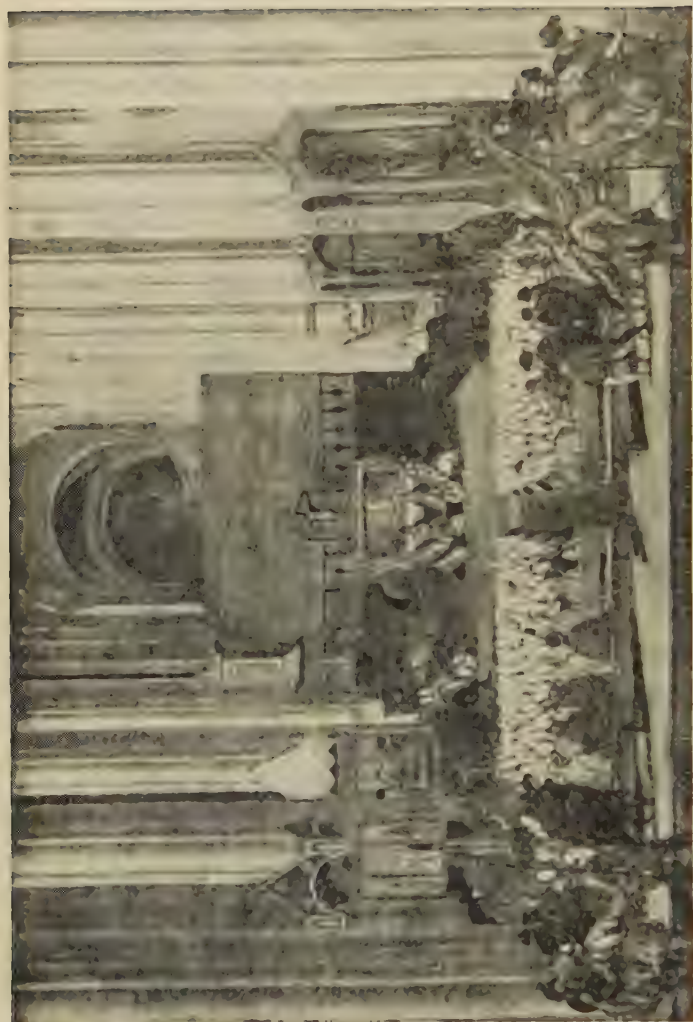
out the west of Europe. This movement dates notably from the time of Louis IX (known as St. Louis), king of France, famous for his personal interest in dispensing justice, and often depicted in that role.<sup>20</sup> And in England, the same rise of nationalism and unified legislation is marked by the reign of Edward I, about A. D. 1300; Edward, for his vigorous constructive influence on English national legislation, has been given the epithet (hardly appropriate) of "the English Justinian". And, so by the time of Luther, of Knox, and of Calvin, in the 1500's, the Universal Church was no longer a universal power.

In the Council Church at Trent, a city in the Tyrolean Alps (which has now become Italian territory once more) took place, in A. D. 1545, the last really Universal Church Council ever destined to assemble. It was attended by over three hundred bishops, ambassadors, cardinals, and other delegates. The great Titian made a painting of it, which now hangs in the Louvre.<sup>21</sup> The deliberations of the Council of Trent, with the adjournments, covered eighteen years, and its legislation ranged over the whole system of Canon law. But by the time this Council ended, the Protestant seceders had broken the church's universal power. The National secular law in each country of Europe was thenceforth to become supreme and exclusive.





XIV. 20—KING LOUIS IX DISPENSING JUSTICE



XIV. 21—THE COUNCIL OF TRENT

It was attended by over three hundred bishops, cardinals, ambassadors, and other delegates.  
Its sessions (with adjournments) lasted for eighteen years

## 7. *Rise of Nationalism*

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The temporal jurisdiction of the papal courts was in time abolished by the various national legislatures. In France, this took place by a series of statutes, beginning in the 1400's and culminating in a statute of the Revolutionary Assembly, in 1790, which abolished the church courts. But in England, the break had come suddenly and completely, by a group of statutes, in A. D. 1532-1534,—measures framed and demanded by King Henry VIII, but fully supported by popular opinion.<sup>g</sup> One statute forbade appeals from English soil to the justice of the Pope; another statute made the English church master of its own legislation, but subject to the king's approval; and a third declared the king to be "the only supreme head in earth of the church of England". The entire papal jurisdiction was transferred to the National courts.

The momentous legal significance of the break can be clearly realized in the rudely resolute and sweepingly self-assertive phrases of the statute of 25 Henry VIII:

[*Statute of 25 Henry VIII Nationalizing Church Law.*]  
'Whereas . . . . . this realm of England, is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same; unto whom a body politick, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, hath been bounden and owen to bear, next to God, a natural and humble obedience; he being also institute and furnished, by the

## *XIV. Papal (or Canon) Legal System*

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goodness and sufferance of Almighty God, with plenary, whole, and entire power, pre-eminence, authority, prerogative and jurisdiction, to render and yield justice and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates and contentions, happening to occur, insurge, or begin within the limits thereof, without restraint, or provocation to any foreign princes or potentates of the world. . . . .

“And whereas the king, his most noble progenitors, and the nobility and commons of this said realm, at divers and sundry parliaments . . . . . made sundry ordinances, laws, statutes, and provisions for the entire and sure conservation of the prerogatives, liberties and preëminences of the said imperial crown of this realm, and of the jurisdiction spiritual and temporal of the same, to keep it from the annoyance as well of the see of Rome, as from the authority of other foreign potentates, attempting the diminution or violation thereof. . . . . Yet nevertheless sithen the making of the said good statutes and ordinances, divers and sundry inconveniences and dangers, not provided for plainly by the said former acts, statutes and ordinances, have arisen and sprung by reason of appeals sued out of this realm to the see of Rome, in causes testamentary, causes of matrimony and divorces, right of tithes, oblations and obventions. . . . .

“In consideration whereof, the king’s highness, his nobles and commons . . . . . enact, establish and ordain, That all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations and obventions . . . . . already commenced, moved, depending, being, happening, or hereafter coming in contention, debate or question within this realm . . . . . shall be from henceforth heard, examined, discussed, clearly, finally, and definitely adjudged and determined within the king’s jurisdiction and authority, and not elsewhere . . . . . any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or

## 7. *Rise of Nationalism*

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any other process or impediments, of what natures, names, qualities, or conditions soever they be, from the see of Rome, or any other foreign courts or potentates of the world . . . . . to the let or impediment thereof in any wise notwithstanding."

Then and there ended—for England—the system of papal ecclesiastical law; that is, as a body of law existing independently of the State, and enforced by an extra-national authority.

And so today the *Codex Juris Canonici*, the Papal Code of 1917, is, by its own terms, merely the Catholic Church's code of morals and discipline for its own believers.<sup>h</sup>

8. By the close of the nineteenth century, the huge mass of papal church-law stood in need of a thorough re-statement. During the seven centuries since the *Decretum* and the *Decretales*, thousands of ordinances of supplementary legislation had accumulated; manners and customs had changed; the temporal jurisdiction of the Pope had ended; new world-wide spiritual areas had been added; much of the law was obsolete; and much of the remainder was difficult to trace through the seven centuries of records.

A commission was therefore appointed, in 1904, by Pope Pius X. Its vast labors, which included consultation with clerical authorities all over the world, had



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Cardinal Gasparri at the head of the commission, and were completed in twelve years; and on May 27, 1917, was promulgated by Pope Benedict XV the *Codex Juris Canonici*.<sup>22</sup>

This work, unlike the old *Corpus Juris Canonici* (with its *Decretum*, *Decretales*, and *Supplements*), is not a compilation, but a genuine codification,—one of the modern world's greatest masterpieces of composition. Its text is in lucid Latin—the only near-universal language; its general style may be seen in the following passages:<sup>1</sup>

[*Codex Juris Canonici*.] “Can. 1553. §1. *Ecclesia iure proprio et esclusivo cognoscit:*

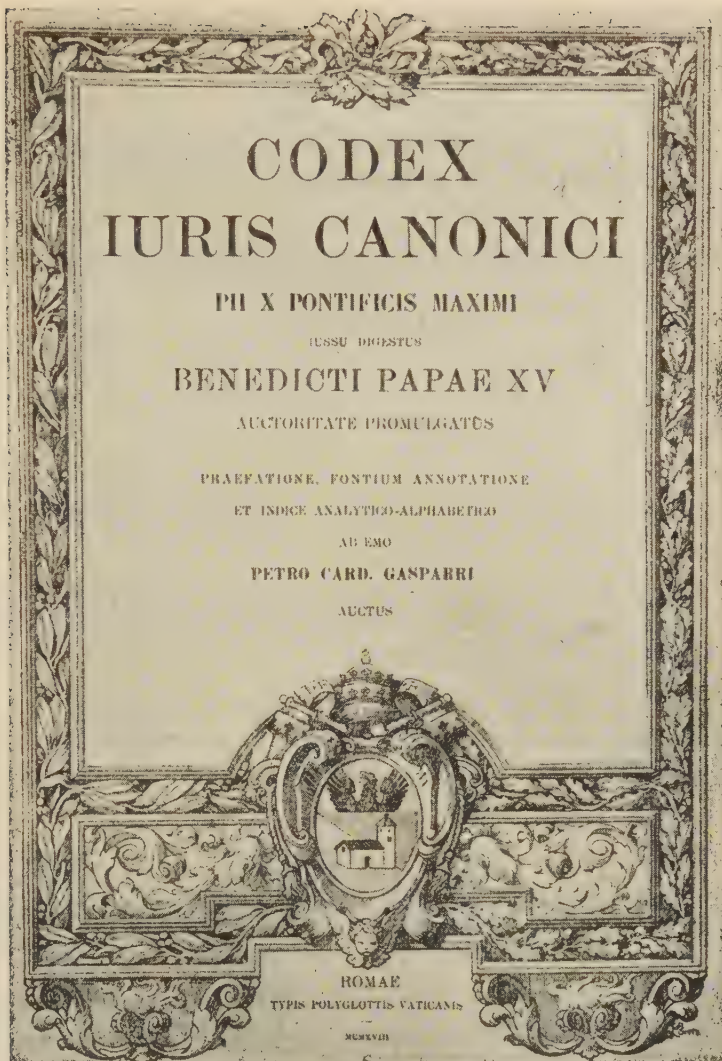
“(1) *De causis quae respiciunt res spirituales et spiritualibus adnexas;*

“(2) *De violatione legum ecclesiasticarum deque omnibus in quibus inest ratio peccati, quod attinet ad culpae definitionem et poenarum ecclesiasticarum irrogationem;*

“(3) *De omnibus causis sive contentiosis sive criminalibus quae respiciunt personas privilegio fori gaudentes ad normam can. 120, 614, 680.*

“§2. *In causis in quibus tum Ecclesia tum civilis potestas aequae competentes sunt, quaeque dicuntur mixti fori, est locus praeventioni.*

“Can. 1554. *Actor, qui causas mixti fori ad iudicem ecclesiasticum deductas ad forum saeculare iudicandas defert, congruis poenis puniri potest ad normam can. 2222 et privatur iure contra*



XIV. 22—THE CODEX IURIS CANONICI OF 1917

[ 967 ]

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eandem personam de eadem re et de connexis causam agendi in foro ecclesiastico. . . . .

“Can. 1742. §1. Iudex ad eruendam veritatem facti quod publice interest ut extra dubium ponatur, debet partes interrogare.

§2. In aliis casibus potest unum ex contententibus interrogare non solum ad instantiam alterius partis, sed etiam ex officio, quoties agitur de illustranda probatione adducta.

§3. Interrogatio partium fieri a iudice potest in quovis stadio iudicii ante conclusionem in causa; post conclusionem in causa servetur praescriptum can. 1861.

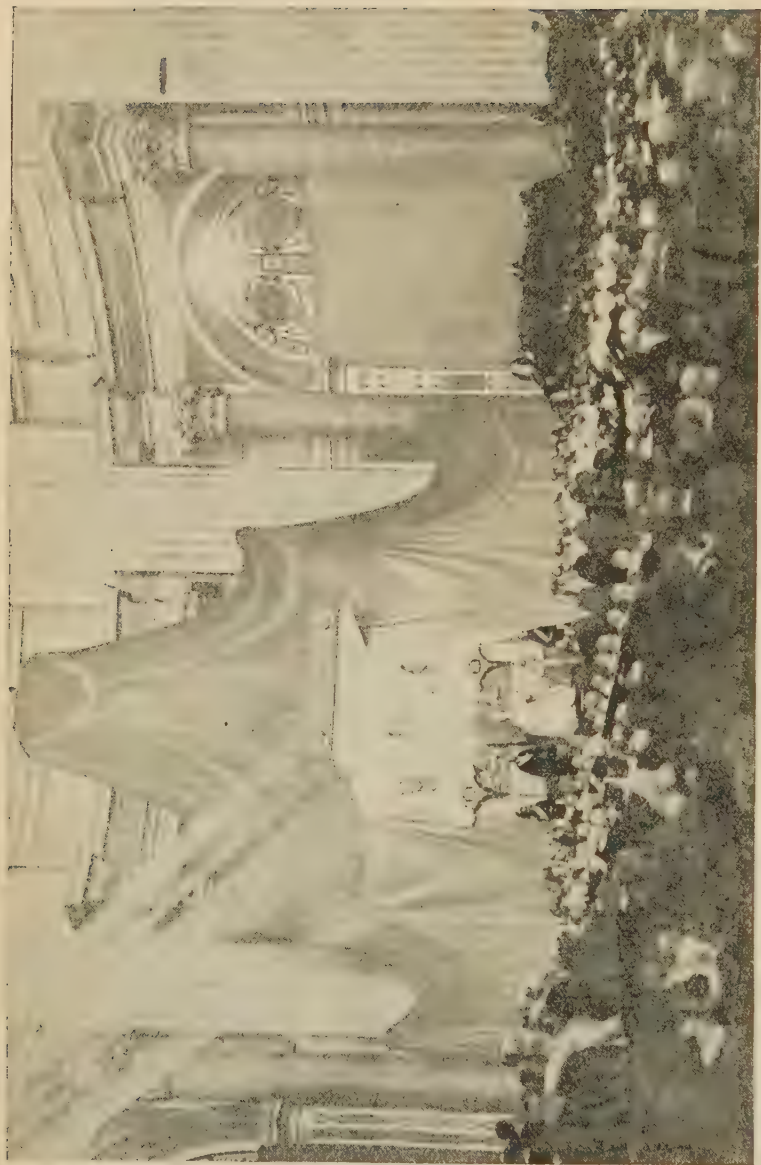
“Can. 1743. §1. Iudici legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso.

“§2. Si pars legitime interrogata respondere recuset, quanti facienda sit haec recusatio, utrum iusta sit, an confessioni aequiparanda, necne, iudicis est aestimare. . . . .

“Can. 1744. Iusiurandum de veritate dicenda in causis criminalibus nequit iudex accusato deferre; in contentiosis, quoties bonum publicum in causa est, debet illud a partibus exigere; in aliis, potest pro sua prudentia.”

There remain today a few Catholic jurists (but they are found even in America) who look back with vain longing to the palmy days of Innocent III, and maintain the medieval doctrine that the papal church's rule of conduct may prevail over the national law; that the papal church may by rights dominate the State; and that a Catholic's superior allegiance, in case of conflicting rules,





XIV. 23—A CONSISTORY AT ST. PETER'S, 1924



## 8. *Codex Juris Canonici*

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may be to the church and not his country's government. The Catholic Church stands in the forefront of the Christian Churches in its theology, its logic, and its wide and wholesome moral influence. And the service rendered by the Church's legal system, in its day, was immeasurable. It is indeed difficult to imagine how Europe could have survived the civic anarchy of the Middle Ages had there been (in Barry's felicitous phrase) "no central, supreme, acknowledged power like the Papacy, guardian at once of faith, of learning, and of law". But that historic service to the law is now only history. The Consistory still meets.<sup>23</sup> But the time has long passed away when the people of any modern nation would endure that their national law and politics, as in the days of Pope Innocent, could be dictated by a distant alien, a supreme autocrat, framing his laws with alien advisers in secret conclave, and responsible to no one on earth but himself.

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### *Sources of Illustrations*

1. *Map of the Church's Jurisdiction, A. D. 1200.* From the "Catholic Encyclopedia", vol. VIII, p. 16 (New York, Robert Appleton, 1907).
2. *Letter of Pope Clement I.* From a photograph of an original MS. of the (False) Decretals of Isidore, furnished by the Librarian of the British Museum (B. Mus. MS. 9 B XII, f. 125).
3. *Palace of the Cancellaria.* From a photograph by *Alinari Bros.*, Rome.
4. *Chamber of the Sacra Romana Rota.* From a photograph taken for the author in 1923 by special permission of the Papal authorities.
- 4a. *Supreme Law Court.* From a photograph by *Underwood & Underwood*, New York, 1932.
5. *Penia and Coccinus, Deans of the Rota.* From old engravings by *Grentor and Thibout.*
6. *A Consistory in the Sistine Chapel.* From a copy of an old engraving, the artist not traceable.
7. *Decretum Gratiani.* From a photograph, furnished by special permission of the Librarian of the Vatican Library, of p. 30, MS. No. 46, dating about A. D. 1325 (Tietze's "Catalog der Illuminierten Handschriften der Rossiana").
8. *Johannes Andreae.* From a photograph, by the *Emilia Co.*, of the monument in the Civic Museum at Bologna.
9. *Pope Gregory IX Issuing the Decretals.* From a photograph by *Alinari Bros.*, Rome, of the painting by *Raphael*, in the Vatican Loggia.
10. *Decretals of Pope Gregory IX.* From a photograph, furnished by special permission of the Librarian of the Vatican Library, of p. 77, MS. No. 113, dating about A. D. 1300-1350 (Tietze's Catalog).
11. *Bull of Innocent III.* From the facsimile in *F. Steffens*, "Lateinische Paläographie", plate 88 (Trier, Schaar, 2d ed., 1909).
12. *Innocent III.* From a photograph, by *Moscione*, Rome, of the fresco-portrait in the church at Subiaco; recommended to the author as the best one, by Monsignore Mann, of the College of Beda, Rome, the foremost living authority on the Lives of the Popes.
13. *Mandate of the Holy Inquisition.* From an original proclamation printed on cloth, purchased by the author in Madrid in 1913.

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14. *Galileo before the Inquisition*. From a view by the McIntosh Stereopticon Co., Chicago, of the painting by *Fleury*, in the Louvre Museum, Paris.
15. *Trial of Joan of Arc*. From a photograph, in the Chicago Art Institute; of the painting by *Dumond* (somewhere in the United States). There is another painting of it, by *Boutet de Monvel*, in the Wm. A. Clark Collection, New York. There are some sketches in *W. P. Barrett*, "The Trial of Jeanne d'Arc" (New York, 1932). The text is given in *P. Champion*, "Procès de condamnation de Jeanne d'Arc" (Paris, 1921).
16. *St. Ives' Statue*. From a photograph, taken for the author, of the original in the church of St. Minihy, near Tréguier, Brittany.
17. *St. Ives Attending to the Petitions of the Poor*. From a lithograph, furnished by *Francesco Fedele*, at the Italian Ministry of Fine Arts, of the painting by *P. Berettini* and *G. B. Borghese* in the Sapienza Chapel.
18. *Pilgrims at the Tomb of St. Ives*. From a photograph by *E. Hamonic*, Tréguier.
19. *A Foreign Lawyer at the Tomb of St. Ives*. From a photograph, taken for the author in 1913, by *Frank B. Dains*, of the University of Kansas.
- 19a. *Memorial Window to St. Ives*. From a photograph of the master-glass-artist's design. For an account of the installation of the window, see the American Bar Association Journal, vol. XVIII, p. 784 (1932), vol. XXI, p. 810 (1935), and vol. XXII (1936).
20. *King Louis IX Administering Justice*. From a photograph, furnished by courtesy of *Stephen S. Szlapka*, Esq., of the Paris Bar, of the fresco-painting by *Cabanel* in the Pantheon, Paris.
21. *Council of Trent*. From a photograph, furnished by *Stephen S. Szlapka*, Esq., of the Paris Bar, of the painting by *Titian* in the Louvre Museum.
22. *Codex Juris Canonici of 1917*. From the title-page of the edition of 1918, printed at the Vatican Polyglot Press.
23. *Consistory at St. Peter's, 1924*. From a photograph by the New York Times Rotograph.

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- a. Letter of Pope Clement I. The full text reads, as given in *P. Hinschius*, "Decretales Pseudo-Isidorianae", 1863, page 53, par. LVII (furnished in

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copy by courtesy of the Librarian of Union Theological Seminary, New York): "Vestrum enim, qui legatione christi fungimini, est docere populos, eorum vero est vobis obedire ut deo. Si autem vobis episcopis non obedi-erint omnes presbyteri, diaconi ac subdiaconi et reliqui clerici cuncti, *omnesque principes* tam maioris ordinis quam et inferioris, *atque reliqui populi*, tribus et lingue non obtemperaverint, non solum infames, sed et extorres a regno dei et consortio fidelium a liminibus sanctae dei ecclesiae alieni erunt. Nam vestrum est eos instruere, *eorum vero est vobis obedire, ut deo.*"

- b. Decree of Valentinian III, A. D. 445 ("Novellae Constitutiones", ed. Haenel, 1844, tit. XVI, §3, col. 175): "Hac perenni sanctione decernimus, ne quid tam episcopis gallicanis, quam aliarum provinciarum contra consuetudinem veterem liceat sine viri venerabilis papae urbis aeternae auctoritate tentare. Sed *hoc illis omnibusque pro lege sit quicquid sanxit vel sanxerit apostolicae sedis auctoritas.*"
- c. Opinion of Coccinus. "Decisionum S. Rotae Romanae coram Reverendissimo Patre D. Ioanne Baptista Coccino Veneto, eiusdem Rotae olim Decano", etc., ed. DeZaulis, Pars prima, Decisio II, page 2 (Rome, Tinassius, 1672).
- d. Passages from the Decretals. Translated from "Corpus Juris Canonici", ed. Friedberg, vol. II, pp. 518, 519, 746.
- e. *Mandate of the Holy Inquisition*: From a proclamation found by the author in a Madrid bookshop in 1913.
- f. *St. Ives*. In the long list of saints, there are indeed some others who have been lawyers but most have no general fame; see the Illinois Law Review for June 1928 (vol. XXIII, p. 199) and January 1930 (vol. XXIV, p. 614).

There is an extensive literature about St. Ives; the following works are accessible in the Elbert H. Gary Law Library of Northwestern University: *Borderic et al.*, eds., "Monuments originaux de l'histoire de Saint Yves" (Saint Brieuc, Prudhomme, 1887; contains the depositions filed at the hearing for canonization).

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*John H. Wigmore*, "St. Ives, Patron Saint of Lawyers" (American Bar Association Journal, March 1932, vol. XVIII, p. 157).

- g. Statutes of 24 H. VIII, c. 12, 25 H. VIII, c. 19, and 26 H. VIII, c. 1 (Statutes at Large, Pickering ed., vol. 4, pp. 257, 283, 312).
- h. Lib. II, Tit. VII, cap. I, Canon 218, §1: "Romanus pontifex, Beatri Petri in privato Successor, habet non solum primatum honoris, sed supremam et plenam potestatem jurisdictionis in universam Ecclesiam tum in rebus quae ad fidem et mores, tum in iis quae ad disciplinam et regimen Ecclesiae per totum orbem diffusae pertinent." "The legal status of the Roman Catholic Church as a non-established church in this country was elaborately examined and defined in the case already referred to, viz.: O'Keeffe v. Cullen, which was an action by a parish priest who sought, by way of suing Cardinal Cullen for defamation, to challenge the validity of a sentence of suspension from and deprivation of the office of parish priest. The position was there laid down, and accepted ever since, as that of a voluntary association of persons who agree to accept and to be bound by certain doctrine and discipline and to submit to the authority of certain voluntary ecclesiastical tribunals, these tribunals in the case of the Catholic Church administering and applying the body of law and system of procedure of the Roman Canon Law." (Kennedy, C. J., in O'Callaghan v. O'Sullivan, Irish Reports, Free State, I, 90, 113; 1925).
- i. Codex Juris Canonici, Canons 1553, 1554, 1742-1744, as printed in Rev. P. Chas. Augustine, "A Commentary on the New Code of Canon Law", vol. VII, pp. 3, 186.

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THE  
ROMANESQUE  
LEGAL SYSTEM





## XV

### *The Romanesque Legal System*

#### *(I) Resurrection of Justinian's Law-Books*

1. Bologna and the Germanic conquerors.
2. Irnerius' lectures—Justinian's texts.
3. The first law school—Government by students—Records of the law-student guilds.
4. Eminent status of the law-professor—The glossators.

#### *(II) Adaptation of Roman Law*

5. The practicians—Opinions on cases—Bartolus.
6. New court-houses in Italy and France—Palais de Justice at Paris.
7. Spread of Roman law studies—Bracton and Azzo.
8. Shift of leadership from Italy—Cujas in France.
9. Netherlands and Scotland.
10. Germany—Reception of Roman Law—Carpzov—Windscheid and Von Ihering.

#### *(III) Nationalization of Roman Law*

11. Roman law as a secondary law only, alongside of local law.
12. The nationalizers, Dumoulin, Colbert, Pothier, in France.
13. Code Napoleon—Nationalization in other countries.

#### *(IV) Expansion of Romanesque Law*

14. Scientific and political motives—Spread of Romanesque law to other continents.



## XV

# The Romanesque Legal System

### (I) FIRST PERIOD



FOR five centuries the Roman empire had been a ruin, and Justinian's law-books had long been unknown or unstudied. Suddenly in the 1100's, the city of Bologna<sup>1</sup> became the center of one of the greatest intellectual phenomena recorded in European history,—the resurrection of Justinian's law-texts. Those resurrected books were destined once more to impress the Roman legal system not only on Europe but far beyond it.



XV. 1—BOLOGNA

This city became the center of the revival of the Roman texts

## XV. *Romanesque Legal System*

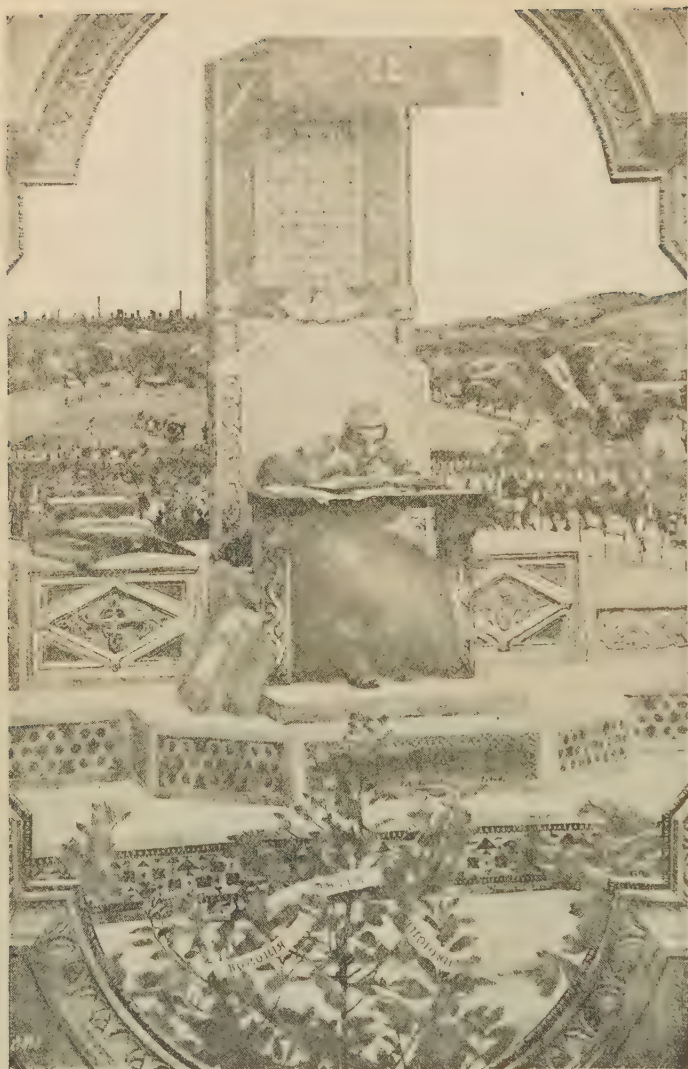
Bologna was now one of a hundred city-states in Italy in which a new civic life was building up after the settlement of the Germanic conquerors in their new lands. The general conditions of armed self-help, typical of those days, are revealed in the tall square fighting towers, each the fortress of a powerful family, a Capulet or a Montague. Some are still standing today; they were once the common feature of all Italian medieval cities.<sup>2</sup> After the gradual collapse of Roman rule, about A. D. 500, and its replacement by the rule of Goths, Franks, and Lombards, the conquered peoples of Italy, Gaul, and Spain had been left to live according to their own Romanized customs. But Roman legal science had been buried, apparently forever. Even in such centres of old Roman life as Bologna and the



XV. 2—THE FEUDAL FIGHTING TOWERS OF MEDIEVAL PAVIA







XV. 3—IRNERIUS, THE LAW PROFESSOR AT BOLOGNA

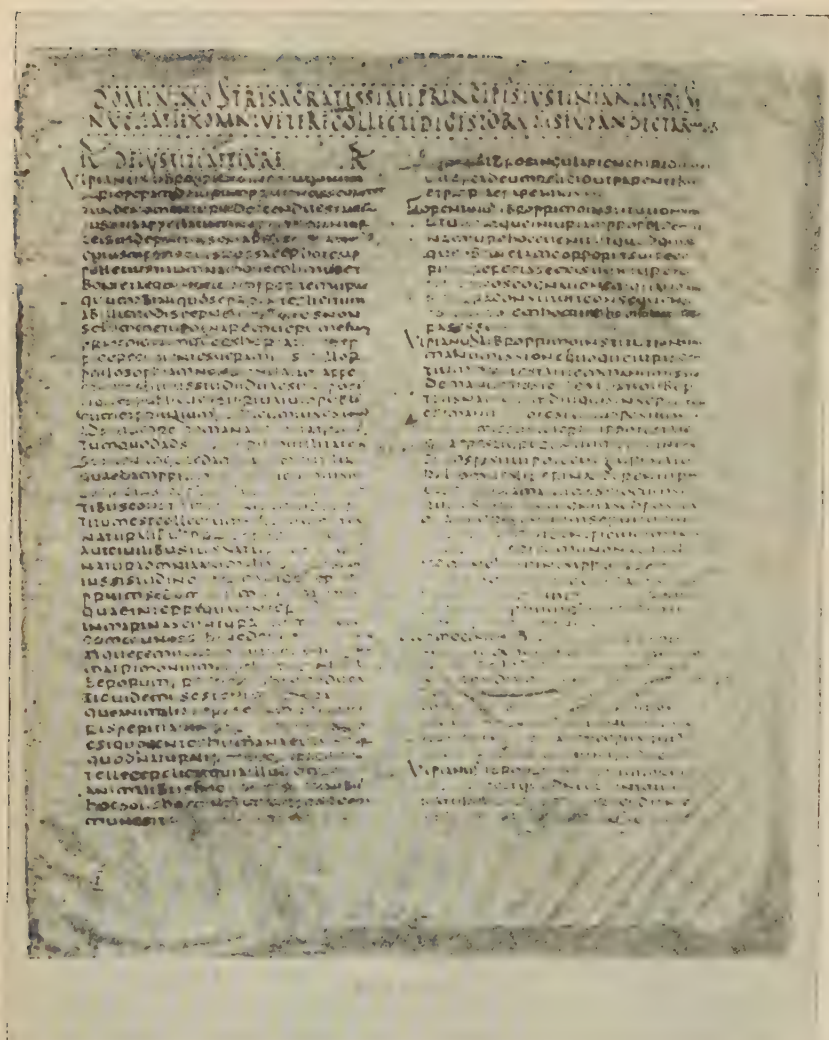
The teacher who popularized at Bologna the study of the resurrected Roman law-texts. This fresco adorns the ceiling of the Town-hall of Bologna

## 2. *Irnerius*

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rest of Northern Italy, the new hordes of alien conquerors were slow in developing. The very rudiments of knowledge were confined to the monks and clergy. All relics of classic pagan learning were despised by the early Christian converts. The hundreds of petty domains were ruled by force, hardly by law. Systematic justice had been shattered, and was growing again slowly and in court practice only. There were no schools nor teachers of law. In short, jurisprudence, the one science of the Romans, had gone, and the Germanics had brought nothing fit to take its place.

2. Amid these conditions, about A. D. 1100, the name of Irnerius appears, as the symbol of a new learning,—the “bright lamp of law”, he was called.<sup>3</sup> We know less about Irnerius’ personality than we do about Gaius or about Shakespeare; yet it must have been one of the great inspiring personalities of the ages. The period was one of general intellectual revival in North Italy. But historians have not yet fully explained just why its most remarkable feature should have been a concentration on legal science, and just why that concentration should take the form of this wondrous resurrection of Justinian’s law-books,—virtually lost and buried for five centuries past. This much is certain, that a young genius named Irnerius, about A. D. 1100, was revered by his successors as the founder of the



XV. 4—JUSTINIAN'S DIGEST  
This is page 1 of the unique manuscript at Florence

## 2. *Irnerius*

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new learning, and that he began to lecture on Justinian's Code and Digest. These texts<sup>4</sup> he exalted as embodying pure legal science, "written reason", far above the crude customs and court practice around him.

He proved to be the man of the hour. His enthusiasm and eloquence had the inspiration of a crusade. Within another century, there were said to be ten thousand students, chiefly in law, at Bologna, crowding thither from all over Europe. They now formed a "studium generale", or university,—the first Christian one in Europe, earlier even than those of Paris and Oxford.

In the great square of San Stefano<sup>5</sup> the traveler may still see the place at which Irnerius is said to have held forth; for in those days the masters lectured in their own houses, or in rented rooms, but if the class of a popular master was large, he lectured in the open air in a public place.

The earliest law diploma extant dates from A. D. 1276. Its language is less concise and more intimate than the forms of today:<sup>a</sup>

" . . . . . Assiduous toil, daily zeal, and prolonged devotion to the study of civic science, merit a reward, so that toil may be transformed into rest, study into profit, and long devotion into perpetual satisfaction. It is therefore fitting that we grant the rewards of virtue to those that merit them and solace the studious with the fruits of toil. Hence the wise, upright, provident, and sage



## XV. *Romanesque Legal System*

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### XV. 5—THE SQUARE OF SAN STEFANO, AT BOLOGNA

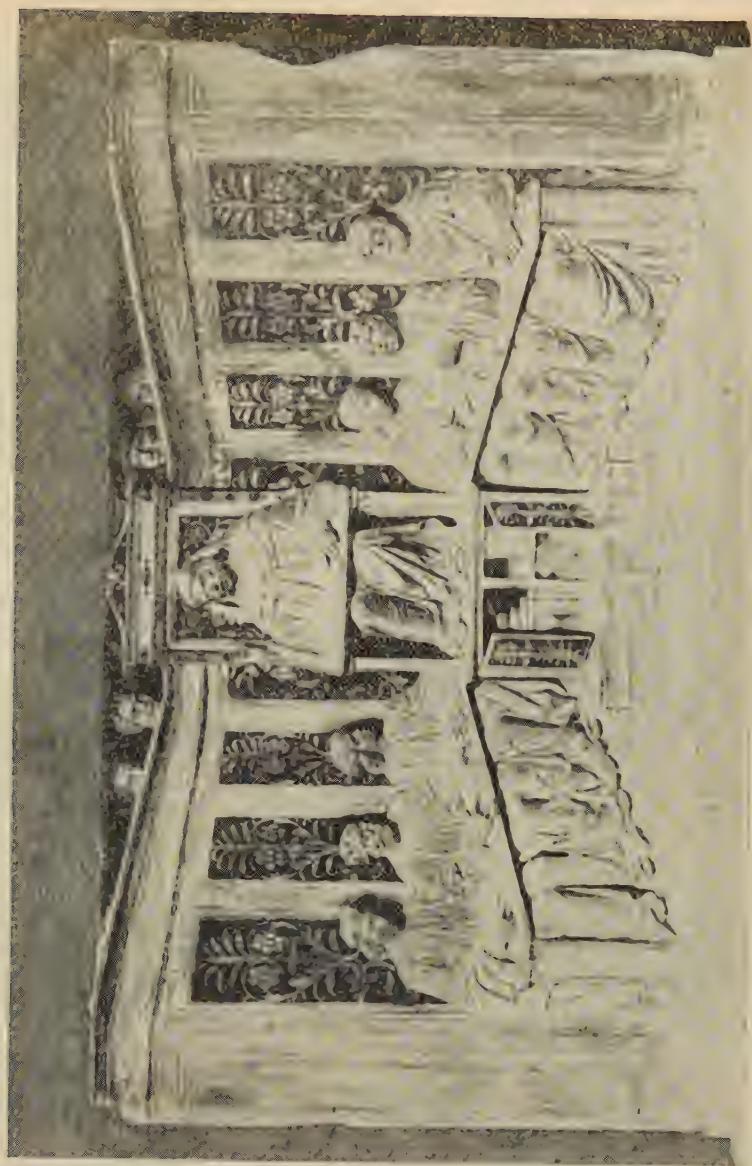
In this square Irnerius is said to have held forth to his throngs of law students

Doctor Peter Amadeo Kiginkola of Brescia, having auspiciously completed his study of the Civil Law, has aspired to receive our sanction, and inasmuch as he has been found most sufficient, as we have been informed by the learned men, to wit [naming the Faculty of Law] . . . we now in the presence of the said Doctors and Scholars do grant him the license here and everywhere to teach the Civil Law and to hold a master's chair. .

"Done at Reggio," etc., etc.

3. But although the masters were the ones who conferred this diploma of admission to their guild, they were not then, as they are today, the rulers of the University. Bologna was a students' university,—a type all its own. The professor<sup>6</sup> was, as it were, a learned adventurer, own-





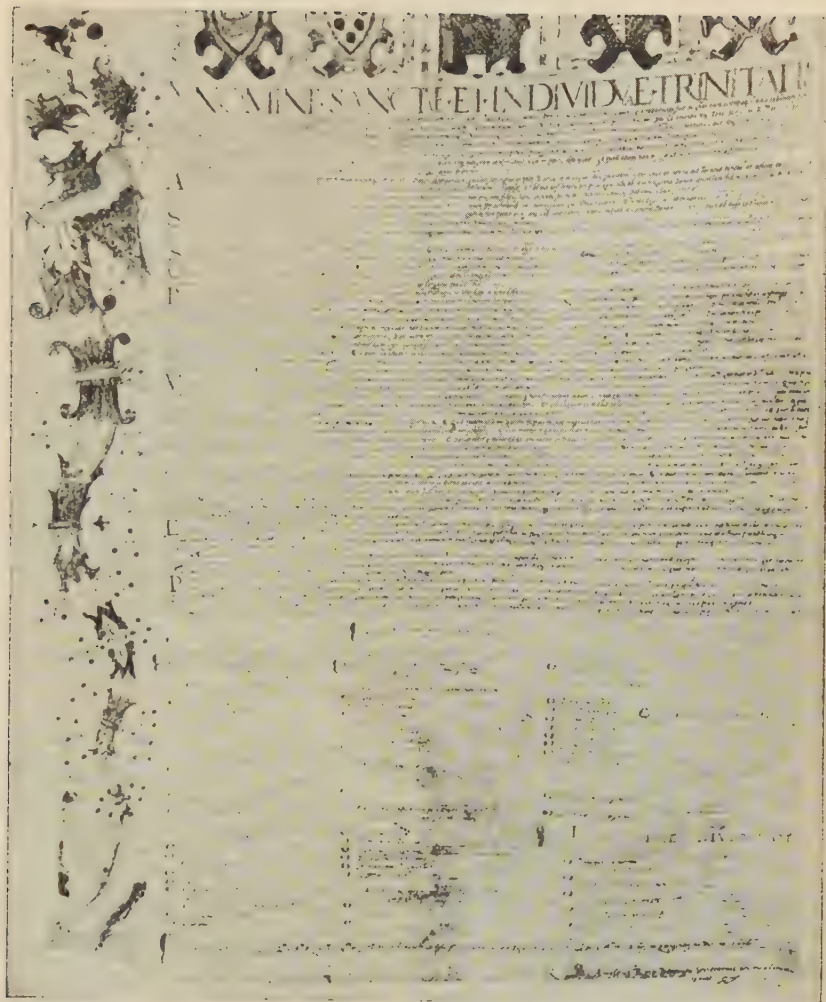
XV. 6—A LAW LECTURER AND HIS CLASS

## *XV. Romanesque Legal System*

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ing some precious manuscripts containing valuable knowledge, and employed by a number of independent gentlemen—the students—to teach them the secrets of that knowledge. The students hired, paid, and discharged the professors; and they took active measures to secure the full value of their fees. They bound the professor by strict rules and penalties; he was fined if he began one minute after the church bell rang at seven in the morning; he was fined if he continued one minute after the bell rang at nine; he was fined if he skipped a chapter of text of Justinian, or if he evaded a difficult passage. He must not dawdle or meander; for the whole text of Justinian was divided into numbered points, and the professor was fined if he did not reach each point by a given date. Moreover, he deposited a sum of money in advance with a banker, and his fines were deducted by the banker on order of the student committee.

The whole student-body was divided into guilds (or fraternities), called “nations”. These nations were well organized, held meetings, and kept elaborate records, some of them very handsomely illustrated.<sup>8</sup> Each nation, or guild, included the men from a particular region, —English, German, Hungarian, Bohemian, Gascon, and so on; in Bologna there came to be fourteen foreign nations



XV. 8—A PAGE FROM THE BOLOGNA LAW-STUDENT RECORDS

## *XV. Romanesque Legal System*

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and four Italian nations. These student-chronicles teem with candid narratives of armed quarrels with the other student nations, and of lively disputes over the appointment and pay of the professors. For example, opening at random the records of the captain of the German law nation at Padua, we read:<sup>b</sup>

"On Nov. 15 Cyriac Adler of Gratz was taken to jail. The reason was this: In this country it is a great privilege to carry arms, but you must have a license. All sorts of persons manage to get the license, by various expedients, but usually on the pretext of being some sort of an officer. Cyriac went and got a license all right, but somehow or other he was given away, and the police arrested him. I called a meeting of the German nation at the shop of John the barber next morning early, to take action. We decided to ask Dr. Marco Blanco, professor of criminal law, to help us, as he is a very good friend of our nation".

And so, the captain's record tells us, finally they got Cyriac released on bonds.

Each nation of students elected annually its captain, or rector; and the captain was entitled, at the close of his office, to affix on the walls of the court-yard or the lecture halls his family escutcheon, in colors. In the University of Padua, three thousand of these escutcheons may still be seen preserved, completely filling the walls of the central cloister above and below and also of the Great Lecture Hall; in this Hall, Galileo taught mathematics for ten years.



### 3. *Law Studies at Bologna*

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New universities, mainly of law students, soon sprang up in Northern Italy,—a dozen of them; and new masters arose, whose fame went over Europe. Popes and Emperors granted charters of privilege to the Universities. The title of “Doctor” now signified an order of intellectual nobility. How preëminent was their status is shown by the monumental tombs<sup>10</sup> of the professors of law, erected to their honor in the public places of the cities; the stone casket was placed within the upper tier of columns. This peculiar architectural style is still a feature of Bologna and Padua.

4. In this great movement Irnerius’ role was to exalt the pure science of the newly resurrected Roman texts. He and his immediate successors, known as glossators, descanted on these texts with glosses, or explanations. When later these were printed, they took the form of solid marginal blocks of print around a



XV. 10—TOMB OF A JURIST AT BOLOGNA



<sup>a</sup> In vetustis  
exemplari-  
bus desunt  
hæc verba: a  
m̄i ame. do-  
mini amen.  
† non est, p-  
petui Augu-  
sti vel dñi; p-  
petui i tem-  
per Augusti,  
hic somniat,  
generalis.

**I**n nomine domini. Hoc in compilatione Dige-  
storum fuit dictum, nō quando leges sacre fuerunt  
q̄a pagani erant: vt. C. de vete. iure enu. l. j. sic et al-  
sacit insti. in proœ. in prin.

**b** Perpetui. id est generalis.

**c** Augusti. Quia

semper iustus p̄posi-  
ti debet esse, vt au-  
geat imperiū, licet  
non semper augeat.  
sic et matrimonium  
individa cōiunctio  
dicitur: tamē diuidi-  
tur quādoq̄: vt. C.  
de repud. l. cōsensu.  
sed propositum con-  
sideratur: vt insti. de  
pa. pōm̄ prin.

**d** Enucleati. p̄ si-  
militudinem vocat-  
us enucleatū, q̄ no-  
bis est traditum in li-  
bris Pandectarū. Si-  
cut enim anteq̄a p-  
ueniatur ad nucleū  
interiorē nucis: vñū  
amarissimū, et aliud  
durū, et aliud ama-  
rū, & quarto ad nu-  
cleū n̄ dulcē perueni-  
tur ita & in multitu-  
dine antiquorum li-  
brorum amaritudi-  
nes inveniuntur. i. di-  
scordia infinita: itē  
duritiæ, i. iniquæ sen-  
tentię, et alia nō sic  
iniqua, in quibusdā tñ locis quædā latebant dulcedines. i. æ-  
quissimæ sententiæ, velut hila inter spinas: & illas dulces sen-  
tentias Iustinianus ex alijs excerpsit, & nobis tradidit legen-  
das: vnde ipse dicitur tradere ius enucleatum, secundum l. d.

**e** Collecti. ex his. i. ex eo quod dixit in principi. p̄t colligi q̄  
fuerit autor siue cōpilator: q̄a Iustinianus filius Iustini\*, vt in  
sit. de dona. §. est. & aliud. Item quæ materia. i. oia vetera iura  
antiquorum prudentium, quæ intentio. i. vt colligas ius enu-  
cleatū in vnum volumē. Vtilitas per se patet: quia minori pe-  
cunia poterit nunc emi liber isse: q̄a citius adipisci potest q̄  
olim. Cui parti philosophi supponatur: & quidem Ethica,  
q̄a de moribus tractat hoc volumen, sicut alia duobus volumina.

\* intellige,  
per adop-ti-  
nem: quia re-  
vera nepos  
eius ex foro-  
re suæ. E. g.  
per.

**I N N O M I N E**  
Domini <sup>a</sup> † Amen. Iusti-  
niani sacratissimī principis p-  
petui <sup>b</sup> Augusti <sup>c</sup> † iuris enu-  
cleati <sup>d</sup> ex omniveterē iure col-  
lecti <sup>e</sup> Digestorum, seu Pan-  
dectarum Liber primus.

TITVLVS I.

## DE IVSTITIA ET IVRE.

Vlpianus lib. i. Institutionum. I.



Vri <sup>f</sup> o-  
perā da-  
turum  
prius <sup>g</sup>  
nosse o-  
portet,  
vnde no-  
men iuris descendat. Est au-  
tem ius à iustitia <sup>h</sup> appella-



## *XV. Romanesque Legal System*

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central core of text.<sup>11</sup> Each master added to these glosses. The texts of Justinian were now multiplied by hand-copies on parchment, and spread all over Western Europe; even in England, Bracton in A. D. 1250 had a copy as he wrote "De Legibus Angliae". And when the great art of book-printing arrived, in the late 1400's, the gloss style was still used; and one of the most popular books, other than theological, was Justinian's Corpus Juris; one of the first complete editions of the Corpus Juris was that printed by Koberger, at Nuremberg, in A. D. 1488, in the gloss style.<sup>12</sup>

### (II) SECOND PERIOD

5. Up to this time the Justinian books had been studied as pure science, much as Kant's Philosophy or Mill's Logic might be studied today. But after two centuries of this, a new type of jurist arose, destined to apply this pure science to the legal practice of the day. These men were known as Practicians, or Commentators. They gave opinions on law-cases and wrote independent treatises.

These commentaries were in style a marked advance on the glosses or marginal notes. These men now for the first time applied the ancient principles of the Roman texts to the Germanic and feudal customs. Roman law began to be transformed into Italian law. The practical spirit of these Commentators may be illustrated by a page<sup>13</sup>





## *XV. Romanesque Legal System*

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of Bartolus on the doctrine of Alluvion,—title to land acquired by operation of water-flow; he presents several careful diagrams to show the application of the principle in different cases. The contrast with the crude Germanic Mirror of Saxony, of almost the same period, is notable.

These jurists, besides lecturing in the law schools, had a large and lucrative practice in giving opinions. Their peculiar status can best be understood from the story of Shakespeare's Portia; Portia is called into court by the party to give an opinion, which is taken as the ground of decision by the judge, and yet the jurist receives a fee from the party. Searching for a brief illustration of these opinions, one comes upon Bartolus' opinion on the wine-selling statute;<sup>14</sup> which seems to reveal that clients were as ingenious then as now in evading a sumptuary law:<sup>c</sup>

"A city statute provided that no one should sell wine at retail, under a penalty. But a certain dealer used to sell to a customer a cask or two casks or a barrel of wine, and so on to other customers, and then the buyers took delivery in flasks and jugs of various sizes. The question is whether the seller has incurred the penalty. As to this, it must be understood that some measures and weights in common use are termed gross or large, others are termed retail or small; see the law of measures;. . . . . and those measures have to be inspected by the custom of the city; see the law of sales. . . . . Now in the said laws a barrel is gross measure, while bottles, flasks, etc., are termed retail measure. Hence, a person selling by the barrel is not selling at



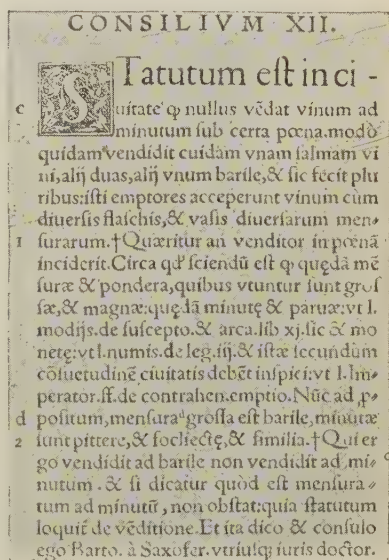
## 5. *The Practicians*

retail. And the fact that this party measured it out to his customers in retail quantities is immaterial; for the statute speaks only of the sale.

"So say and advise

"I, Bartolo of Sassoferrato, doctor of both laws, and have signed in testimony thereof and affixed my seal".

The most famous exponent of this applied Roman law was Bartolus,<sup>15</sup> about A. D. 1350, whose works dominated for two centuries or more. He was called "the monarch of the law". The saying ran, "Nemo jurista nisi Bartolista". So extraordinary was the respect paid to this jurist that the Emperor Charles IV, when ennobling him, conferred on him by charter this singular privilege, that he, and all his descendants who might be professors of law, should have the power to legitimize any bastard students who might attend their classes! So distinctive was this man's impress on the practice of law that in some schools the very program of a law lecture was described as consisting

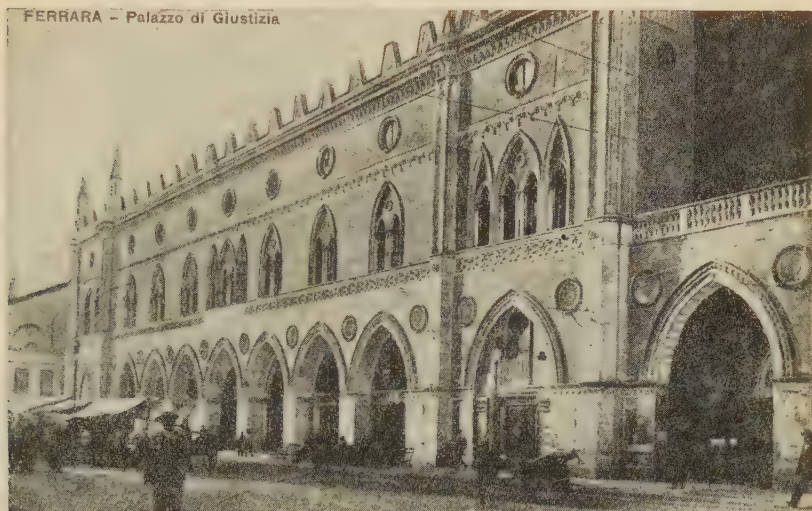


XV. 14—BARTOLUS' OPINION ON THE  
WINE-SALE STATUTE



XV. 15—BARTOLUS

## 5. *The Practicians*



XV. 16—PALACE OF JUSTICE AT FERRARA, A. D. 1321

of three parts, “textus, glossa, et Bartolus”,—as if an Anglican law school curriculum should be summarized by saying “common law, equity, and Chitty”.

6. Bartolus and the Practicians had now carried the resurrected Roman law into the courts. A learned profession arose and multiplied. And from this period the new movement is reflected in architecture. As once in old Rome, special buildings and spacious halls were now devoted to “palaces of justice”,—as they were called in Italy and France.

The court-house at Ferrara<sup>16</sup> is probably the third oldest extant in Europe, built A. D. 1321; only West-

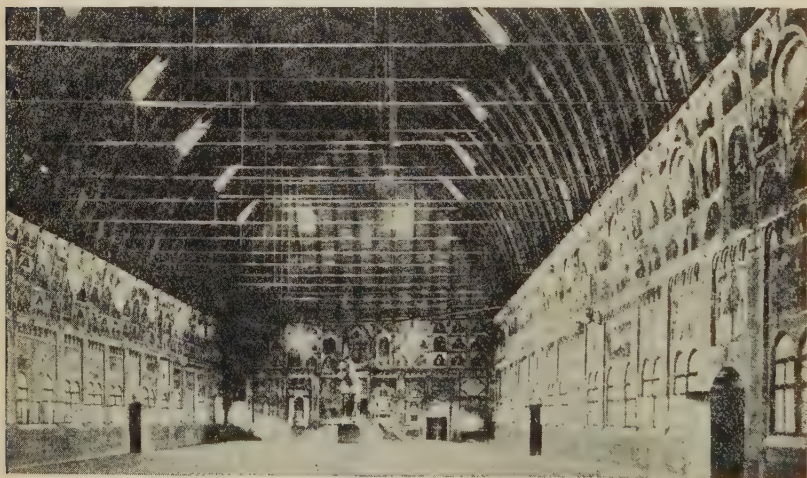


## *XV. Romanesque Legal System*

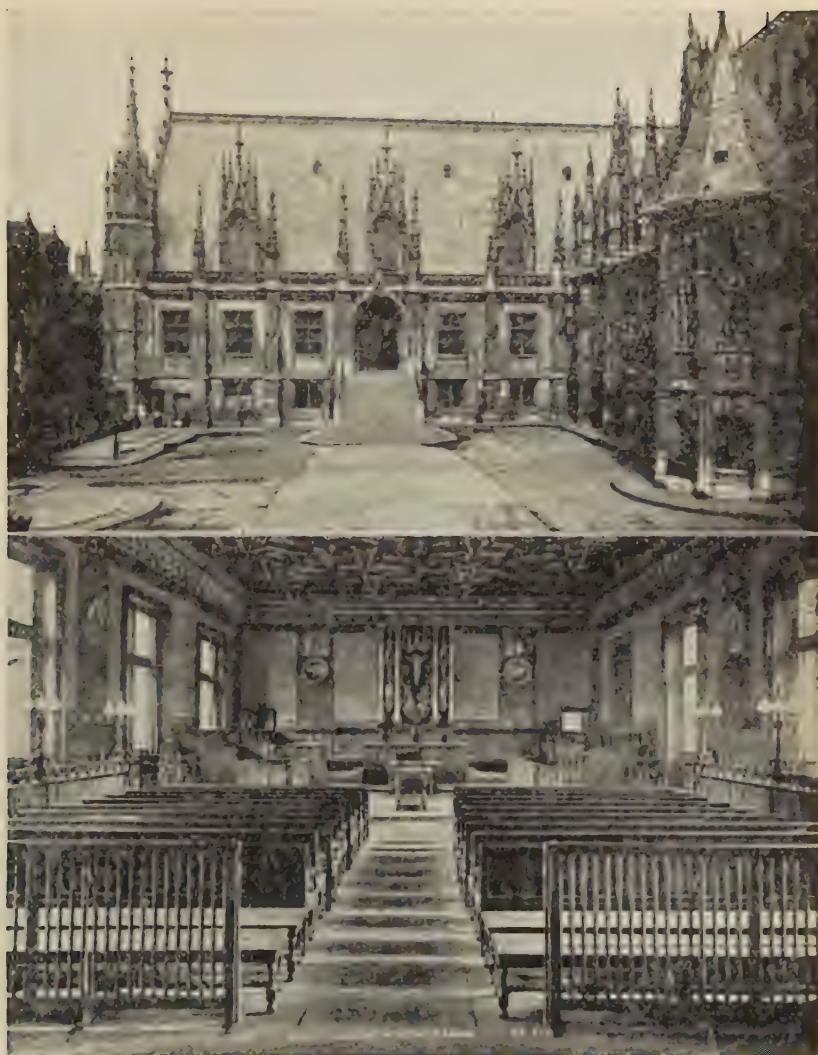
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minster and Paris are earlier. At Padua<sup>17</sup> may still be seen a courtroom of A. D. 1420, probably the largest courtroom in the world, larger even than Westminster Hall; it is three hundred feet long, one hundred wide, and eighty high. And there is still shown the stone-pillory in the corner of the hall, on which bankrupt debtors were exposed to the jeers of the populace in penalty for their fraud.

At Rouen, on the Seine, the capital of Normandy, still stands the superb court-house, now termed Palace of Justice,<sup>18</sup> started in the 1400's, one of the finest surviving monuments of Gothic art in a civic edifice. Next to Fer-



XV. 17—PALACE OF JUSTICE AT PADUA  
This is the largest courtroom in the world



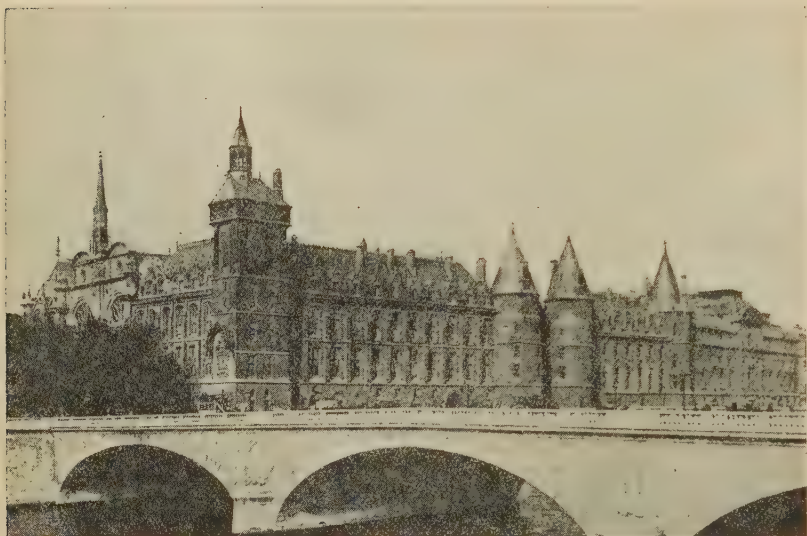
XV. 18—PALACE OF JUSTICE AT ROUEN  
The exterior court-yard and the trial courtroom

[ 1001 ]



## *XV. Romanesque Legal System*

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XV. 19—PALACE OF JUSTICE AT PARIS

rara and Paris, this is probably the oldest surviving courthouse in Europe continuously used to the present time for that purpose; for Westminster Hall in London, though older, has now been abandoned as a courtroom.

But the most famous of these edifices is the Palace of Justice in Paris. For two thousand years, since Caesar's day, when a Roman praetor here set up his court, a temple of Law and Justice has stood on this spot.<sup>19</sup> Louis IX, Saint Louis, whose name is linked with justice in French tradition, here heard causes of the suitors in person, and in the 1200's here in his palace established the first court

## 6. *Palaces of Justice*

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of appeal, or “*curia regis*”; later, in the 1400’s, his palace was given over to the exclusive use of the Law Courts of Paris, and was thenceforth known as the Palace of Justice. One-half of the drama of French history has been enacted within these walls. In this building cluster for centuries the traditions of the French Bar, both convivial and intellectual. Here were held the revels and theatricals of the barristers’ order, like the celebrated revels of the London Inns of Court. Here in the Great Room, or Gilded Room,<sup>20</sup> the kings of France held their beds of justice—that is, the most solemn sessions of the Supreme



XV. 20—A SESSION OF THE SUPREME COURT AT PARIS

## *XV. Romanesque Legal System*

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XV. 21—THE TRIBUNAL OF THE TERROR

Court. Here in April, 1654, the young Louis XIV in boots and spurs uttered his famous words, "The State—that is Myself". Here in 1794 sat the Revolutionary Tribunal of the Terror,<sup>21</sup> which sent two thousand condemned persons to the guillotine in two months. And here, in the spacious Salle des Pas Perdus (or Hall of Wasted Time), long generations of French lawyers have rendezvoused with their throngs of clients in preparation for their trials.<sup>22</sup> The glorious record of the French Bar for professional independence and courage is equalled by none other in the world, except the Anglican. Four times in French legal history has the entire Bar resigned its functions, and left the courts without lawyers, rather than submit to the arbitrary dictation of princes and politicians. And when the Advocate-General Servin, protesting on behalf of the Supreme Court of Paris against an unjust decree, fell dead in the presence of Cardinal Richelieu and King Louis





*Imp. lithog. de J. Delpech*

*Juvenet des Ursins Chancelier de France  
(Règne de Louis XI 1461-70.)*

XV. 22a—A CHANCELLOR OF FRANCE IN THE 1400's



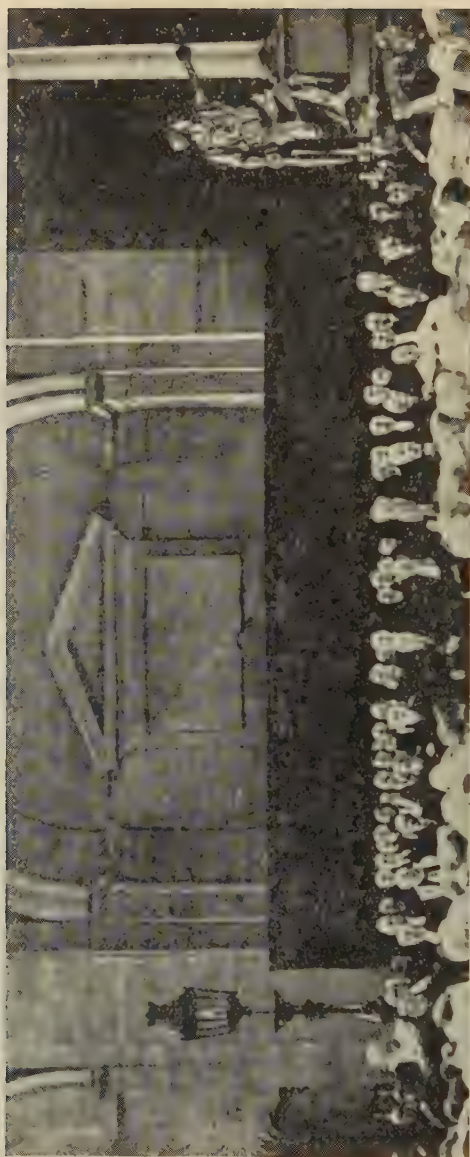
## 6. *Palaces of Justice*

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XIII, he exemplified the Bench's proud tradition of courageous independence.<sup>22a</sup> This record is symbolized in this Hall by the statue of the heroic Malesherbes, the Erskine of France, who dared to act as counsel for Louis XVI before the Revolutionary Convention, and himself met his royal client's fate at the guillotine two years later. Here, too, has been placed the inspiring monument to the Paris lawyers who gave their lives for their country in the World War. And it was an impressive consummation of these traditions when in July, 1924, for the first time in history, the President of the American Bar Association



XV. 22—THE SALLE DES PAS PERDUS, IN PARIS  
This is its popular name, "Hall of Wasted Time"



XV. 23—THE AMERICAN BAR ASSOCIATION AT THE PALACE OF JUSTICE, 1924

## 7. *Shift of Roman Law Leadership*

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and the President of the Paris Bar Association met and fraternized in the name of our common profession.<sup>23</sup> Yet the popular epithet for this Hall is a cynical reflection on that same profession; for it signifies that going to law is in popular esteem merely time and money wasted for the client.

7. Meanwhile, by the third century after Irnerius, Italy's star of leadership in Roman law was waning. During the 1200's, 1300's, and 1400's, the thousands of foreign students had gone back North and West carrying the new advanced ideas of Roman Law. Italian doctors of law were invited abroad. Faculties of law sprang up in Spain, France, Germany, and the Netherlands.

Even as far north as England, indeed, some of the Bologna jurists had early wandered, bringing the new science. Doctor Vacarius, of Bologna, about A. D. 1150, the very next generation after Irnerius, came to England and taught law, probably at Oxford. The chronicler says that students both rich and poor flocked to hear him teach the Roman laws; and because the poor students could not buy parchment copies of Justinian's Code and Digest, he made a summary for them, containing all that a student would need to know,—*if* he knew it perfectly; and this was called a Summary of Law for Poor Students. Another chronicler tells us that English University students at this

## *XV. Romanesque Legal System*

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period had abandoned philosophy for the study of Roman law. The Bologna jurists' books also were widely circulated in England. Many famous passages of Justinian's Digest, quoted literally in Azzo's book, we find again, word for word, in Bracton's treatise; for we know that our English judge and first great author, Henry Bracton, about A. D. 1250, copiously used a Summary of Roman Law, by Azzo of Bologna, in composing his treatise on the Laws of England. Azzo of Bologna was called in his day "master of the masters of law"; he was so authoritative that the popular phrase ran: "Chi non ha Azzo non va al palazzo", which may be translated: "Unless on Azzo you prepare, the jurist's robe you'll never wear".

But Roman law was still too exotic for regions like England and Germany, where sturdy Germanic legal ideas were yet solid and pure. And so it was natural that in South France the new Roman law first found most fertile soil for cultivation. In the 1500's the primacy in Roman legal scholarship passed to France; in the 1700's to Holland; in the 1800's to Germany;<sup>24</sup> for, as political, intellectual, and commercial influences pushed gradually west and north the centre of European forces, so also the primacy in Roman law studies gradually shifted, from century to century, through four countries.

## 8. Primacy of France



XV. 24—MAP SHOWING THE SHIFT OF PRIMACY IN ROMAN LAW STUDIES

8. In France, the great name was Cujas.<sup>25</sup> Roman law had in France by the 1500's become the fashionable study for the nobility. At some courses, four thousand hearers are said to have attended,—incredible as this may sound. New and improved methods of research and exposition had been devised, and Cujas was their greatest exponent. The old style of Bartolus was called “mos





XV. 25—Cujas

[ 1010 ]

## 8. *Primacy of France*

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Italicus"; the new style was now known as "mos Gallicus". The English jurist Duck wrote, in A. D. 1650, "Roman legal science, if it should perish in every other country, could be entirely reconstructed from French learning only". The School at Bourges, where Cujas taught, was then termed "the great market-place of legal science in Europe". When professors in Germany cited Cujas, they lifted their hats at the mention of his name. At Bourges it was the custom of his admiring students to form a procession and escort him from his house to his lecture, and back again.

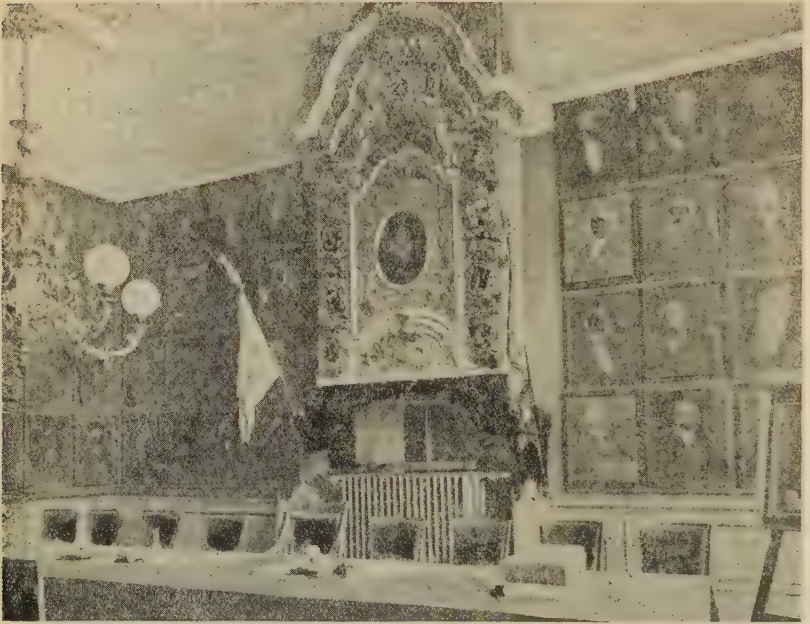
In the house of Cujas,<sup>26</sup> the traveler may still contemplate the habitat of this unique scholar. His peculiar custom was to leave his books all around him on the floor of his study, to lie on his stomach as he read them, and to drag his short stout body across the room from one pile of books to the other as he took his notes.



XV. 26—THE HOUSE OF CUJAS

## *XV. Romanesque Legal System*

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XV. 27—THE SENATE HALL AT LEIDEN UNIVERSITY

9. By the 1700's the primacy had passed northwards to the Netherlands. Of the Senate Hall<sup>27</sup> at Leiden University the German historian Niebuhr has said, "No locality in Europe is so memorable in the history of science". Hugo Grotius was learned in Roman law, though he left his imperishable mark on international law; his work on the Law of War and Peace, appearing in 1627, was placed on the Index Expurgatorius by the Pope (though recently taken off), yet it became the Bible of



XV. 28—NOODT, PROFESSOR AT LEIDEN

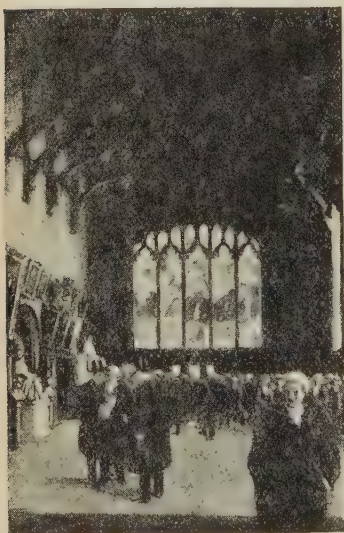


## *XV. Romanesque Legal System*

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lawyers. But in the Roman law field the Netherlands at this time, under the scholarship of men like Noodt,<sup>28</sup> devised new methods. The "methodus Noodti", often termed the "elegant method", now became more fashionable than the "mos Gallicus" of France.

The Dutch influence reconstructed Scottish law. Long before this period, Scottish law students had begun to flock to Leiden to study the Roman law; and it was the political feuds with the English, and the proximity of Leiden, which resulted in Scotland almost completely Romanizing its law under Dutch inspiration. A



XV. 29—PARLIAMENT HALL,  
EDINBURGH

Scottish jurist, speaking of the end of the 1500's, recorded that "those who are in daily practice in the courts consume their days and nights in learning the civil law of the Romans, and give their whole labours to the practising of it, neglecting the laws of their fathers."<sup>a</sup> And the Hall of Justice,<sup>29</sup> in Edinburgh (known as Parliament Hall), is today the only one in Europe (except Paris) where the barristers



## 10. *Primacy of the Netherlands*

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still keep up the ancient custom of meeting the attorneys and clients in this great anteroom to the courts.

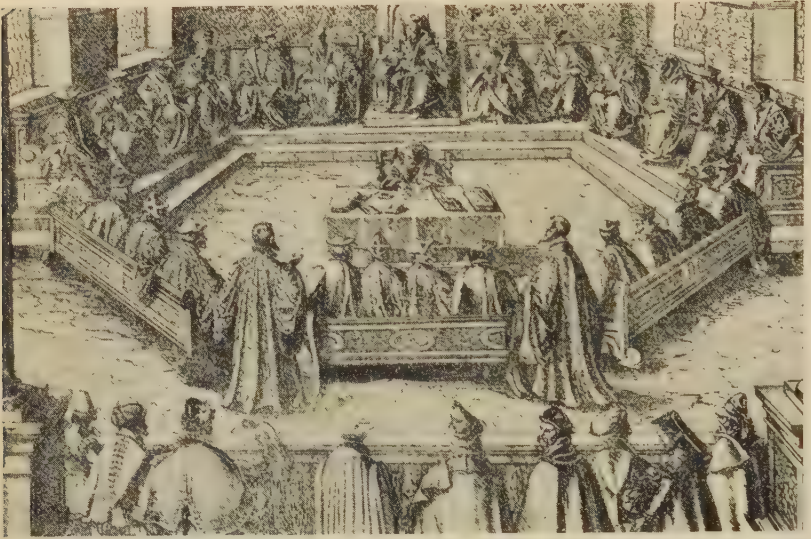
10. But by the 1800's the primacy in Roman law studies passed to Germany.

As early as A. D. 1500, indeed, the new Roman law science had made its way into the German faculties, and was knocking at the doors of the courts. Hundreds of law students had gone to the law schools of Italy and of France during the 1200's, 1300's, and 1400's; for example, a single noble family of Germany in the 1400's sent seven of its scions to Italy for a doctor's degree in law. These men, trained in the new legal science, came back and spread its gospels. They took service with princes, and gave clever advice in the political struggles. They founded law schools; the first German faculty of law was organized at Heidelberg in A. D. 1498, four centuries after Irnerius; and others followed shortly. Soon these doctors of law were made judges by the princes.<sup>30</sup> The German emperor encouraged their Roman law, because it was imperialistic; and in A. D. 1495 he established the Chamber of Justice of the Holy Roman Empire; one-half of its judges might be princes, but one-half must be doctors of the new Roman law.

These new doctors sneered at the crude rules of thumb of the old Schoeffen-Court of lay judges (*ante*, Chap. XII).

## *XV. Romanesque Legal System*

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XV. 30—GERMAN APPEAL COURT, A. D. 1500

They cited the Romanesque texts in their opinions and ignored the local customs. The old Schoeffen, indeed, what with the introduction of written pleadings and Latin opinions, could no longer well understand what the suit was about; for few of them could read and still fewer could write. In the rivalry which ensued there was much bitterness. But the learned doctors of law prevailed. A trained legal profession grew up. As a culmination, we find the German Faculties of Law given the status of “*amici curiae*”, or judicial advisers in law cases, and their opinions obtained the force of law.



## *XV. Romanesque Legal System*

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An opinion of the great Carpzov<sup>31</sup> illustrates the way this influence helped to bring in Roman law. Carpzov was a professor in the Law Faculty of Leipzig, and also chief of the Court of Schoeffen or lay-judges, as well as a member of the Court of Appeals. (This extraordinary man, by the way, is said to have pronounced twenty thousand death sentences in his judicial career, or about twenty a week; but was withal a very pious Protestant, and had read through the entire Bible fifty-three times). His printed opinion, or consilium, on a given case is seen<sup>32</sup> to be composed in Latin, and sets forth the reasons according to Roman law, citing largely the Digest of Justinian; then at the end, in the right-hand column, is the entry: "Thus decided the Schoeffen of Leipsic in Jan. 1644"; the text of this Schoeffen's judgment, however, is in German. Yet the copious italics for Latin law-terms show that even the court-records were yielding to the new Roman technique.

- German legal learning in Roman law culminated with Savigny and Windscheid and Von Ihering in the 1800's.<sup>33</sup> The development had been slow; for, naturally, the pure Germanic rules of the North were slower to yield to the new Roman influence than the institutions of Italy and south France and Spain, which were already half Roman



## 10. Primacy of Germany

### Decisionum Illustrum Saxonicarum

propter ejus defensionem. † ob quam multa ad-  
coluntur, quæ regulis juris alias contrarii vi-  
dantur, Dac. Mober. ad Const. Elect. 23. num. 13.  
part. 4. Ho. polit. de Matil. in l. 1. §. si quis ul-  
tim. §. 9. & seq. ff. de quest. de quo dixi in pract.  
criminal. part. 3. quest. 15. n. 74. & 75.

(2.) † Admittitur quoque examen testium  
ad perpetuam rei memoriam in criminalibus,  
quando iudex per inquisitionem & ex officio  
procedit, dist. cap. quoniam frequenter. §. sunt  
& alii casus. uli Gloss. in verb. regulariter, vers.  
Et in causa inquisitionis & Hostiensis, num. 5.  
ver. ut lre non concessata. Farin. dist. quest. 76.  
n. 6.

Nempe quia tunc testes recipiuntur pro infor-  
matione iudicis, quæ regulis juris non subijcitur;  
Sed licet iudici procedere, etiam si nec de delicto  
nec de delinquente constet, hunc in finem, ut co-  
gnoscatur, an crimen certa in provincia commis-  
sum, & quisnam autor istius sit, quo tutius postea  
specialis inquisitio formari queat, Angel. Aretin.  
de malefic. in verb. Hæc est quadam inquisitio n. 3.  
Marant. in specul. tit. de inquisit. num. 30. & seqq.  
Ernest. Cothmann. vol. 3. Respons. 30. n. 13. Batol.  
in l. congruit. num. 3. ff. de offic. prefat. Conrad.  
Lancelot. de inquisit. n. 5.

venimus 13. ff. de aur. & argent. §. si tamen alio-  
25. Inst. de rer. division. Castren. in l. si ita stipula-  
tus §. Ca. sagonus vers. quæ nota. ff. de verb. ob-  
ligat. Sixtin. vol. 2. consil. Marpurg. 7. n. 59. † Mi- 22  
tei quoque si diceremus, trans legi adinventu ef-  
fet, cum nemo non criminaliter agens, annectere  
posset petitionem civilem, ad hoc, ut testes statim  
examinari possent; at fraudi non est indulgen-  
dum, l. in fundo 38. ff. de rei vendicat. l. cum hi, §.  
§. si, cum his 20. ff. de transact.

Ita † Scabini Lipsiensis ad requisitionem Joh. 23  
Geid. Hu. 1663 in Helmsdorf, Mens. Jan. An. 1644.  
(Verba Sentent. Hæc Titus in Delictis Seis, wi-  
der Cajum wozen pract. aditer Linren. so er, als in  
Kaufman. v. hant. igne. De. unter, erwiesien ha-  
ben soll, civiliter ablaget, nachmachet aber etliche  
Additionales über den, und sein Petium unter  
andern so weit sonderet, daß er Cajum nunmehr  
principaliter Actione criminali, auff die ordentli-  
che in Reichem gegündere Straffe des Dieb-  
stahls, nachmachet, auch und incidenter restitu-  
tionem rerum creptarum weile belainge haben, weil  
der Zeugen etliche zu See verhande deute, hat er un-  
ständig angeluchet, dieselbe noch vor der Kreis-  
Defeingung, ad perpetuam rei memoriam abzu-  
ren, Als nun Cajus veld. mit fachen wiederherrechen,

### XV. 32—AN OPINION OF CARPZOV

The opinion is composed in Latin, but the judgment  
("sententia") is formulated in German

or more. And so it was not until the 1800's that Ger-  
many's turn came to stand in the forefront of Roman-  
esque law. Windscheid's Pandects became a reference-  
book throughout Europe; some of Von Ihering's books  
went into twenty German editions and into nearly every  
language of civilization; and Germany's authority in  
Roman law studies became world-wide.





XV. 33—WINDSCHEID AND VON IHERING

## *11. Nationalization*

### (III) THIRD PERIOD

11. But during most of these seven centuries from A. D. 1100 to 1800 Romanesque law had passed through only two of its four stages; the remaining stages may be briefly outlined:

| Dates                                    | Processes                                                                                                                                                                                          | Agencies                                     |
|------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| A. D.<br>1100<br>1200                    | I. THE RESURRECTION<br>of Justinian's<br>lost Book-Law                                                                                                                                             | The Jurists<br>of the<br>Universities        |
| 1300<br><br>1400<br><br>1500<br><br>1600 | II. THE ADAPTATION<br>of it to the new social<br>conditions of Romano-<br>Germanic peoples<br>and<br>THE ADOPTION<br>of it as a Common Law of<br>western Europe alongside<br>a thousand local laws | The Jurists<br>and<br>The Practi-<br>tioners |
| 1700<br><br>1800                         | III. THE NATIONALIZATION<br>of these into Romanesque<br>National Codes                                                                                                                             | The Jurists<br>and<br>The Legislators        |
| 1900                                     | IV. THE EXPANSION<br>of Romanesque principles<br>over the World in other<br>national Codes                                                                                                         | The States-<br>men and<br>The Jurists        |

The first stage had been the Resurrection of Justinian's law.

The second stage had been the Adaptation of it in practice to the new social conditions, and the Adoption of

## *XV. Romanesque Legal System*

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it as a general or common law. But this "common law", as it was called, was only secondary; in practice, there were still a thousand separate jurisdictions whose local law had the priority over this common law (*ante*, Chapter XII). Each of these local law-bodies was more or less Germanic; only the secondary common law for all was Roman. How little the law of those days could yet be deemed national may be inferred from the fact that neither in France nor in Germany was there a professorship of French or of German law until about A. D. 1700.

In the third period, then, it remained to merge these into a single nation-wide system for each country. This new system would be neither Germanic nor classic; it would be Romanesque, in the same way that a well-known type of architecture has been termed Romanesque. And, most of all, it would be a unified national system.

12. This great task of nationalizing the law was first achieved in France in the early 1800's, but only after three centuries of effort.

Charles Dumoulin,<sup>34</sup> a fiery patriotic lawyer of the 1500's, had already dreamed of a single code for France. This most famous lawyer of his day was an embodiment of self-esteem; at the caption of his opinions he wrote: "Ego a nemine doceri possum", "Nobody can teach Me the law". But Dumoulin was one of those characters of



XV. 34—DUMOULIN  
"Nobody can teach Me the law"

## *XV. Romanesque Legal System*

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indomitable honesty who have made the Bar an honorable profession. When a certain powerful count had asked him for an opinion, in a cause which Dumoulin deemed an unjust one, he refused it; the Count threw him into prison—and Dumoulin still refused the opinion.

Dumoulin's dream of a national code was premature. But in the next century, about A. D. 1665, a partial success was achieved by that great minister of Louis XIV, Jean Baptiste Colbert,<sup>35</sup> a man of Scotch ancestry. Louis XIV aspired to be known as the Justinian of France, and Colbert was his Tribonian. Colbert has been by some historians termed the greatest minister in the annals of mankind. Within twenty years he had unified, nationalized, and codified five great fields of law,—Civil Procedure, Criminal Procedure, Commercial Law, Maritime Law, and Colonial Law. But he never lived to complete his career with a Civil Code.

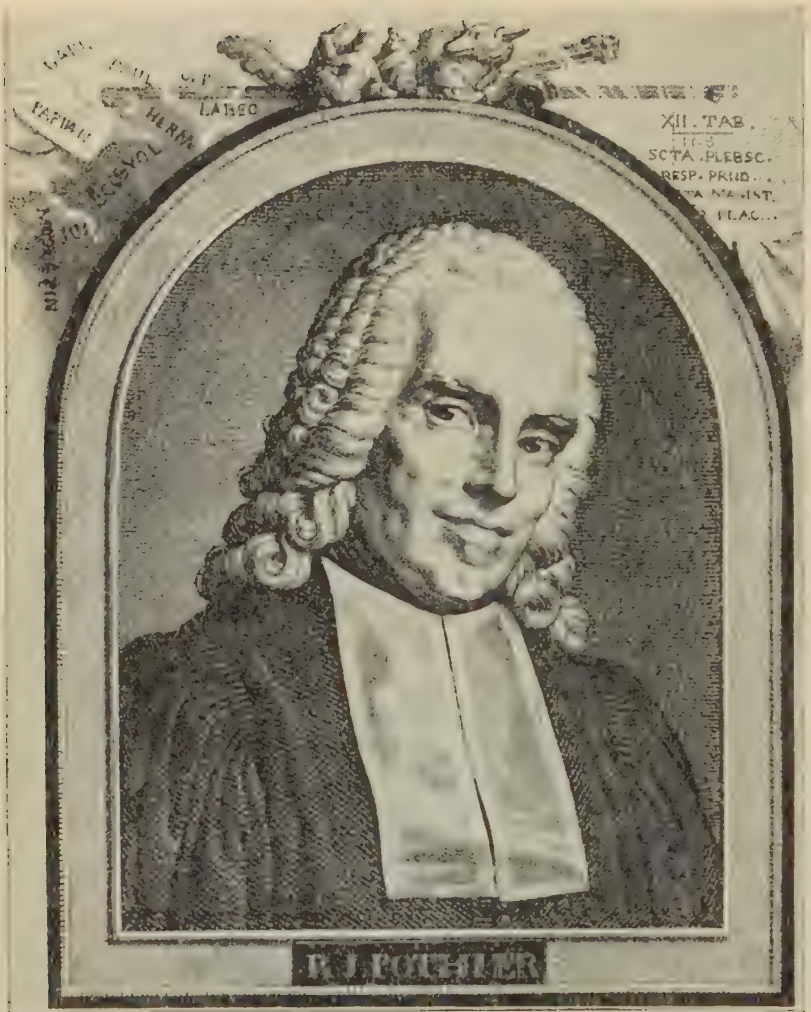
In the next century, the 1700's, however, this task was brought nearer by Robert Pothier.<sup>36</sup> Pothier was professor at Orleans, but also served for fifty years on the bench. During the last twelve years of his life this extraordinary man wrote a comprehensive series of twenty-six separate treatises, covering the whole civil law. Voltaire had said, in sarcasm, that the traveler in France changed his law as often as he changed horses. But Pothier





XV. 35—COLBERT THE CODIFIER

[ 1025 ]



XV. 36—POTHIER, JUDGE AND PROFESSOR

In twelve years he wrote twenty-six treatises, covering the whole French civil law, and preparing the way for Napoleon's nationalization of the law

## 12. *Colbert, Pothier*

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demonstrated that the civil law of France could be stated in the form of a single harmonious nationalized system. It remained then only to bring about political unity and centralized legislation, and this law of France could be codified.

13. This was the achievement of the Revolution. The jurist Cambacérès,<sup>37</sup> in 1796, afterwards Second Consul and Minister of Justice under Napoleon, was the prime mover, with a draft for a national code, at the very opening of the Revolution.<sup>38</sup> But dissensions blocked his plan. It remained for Napoleon, the man of autocracy, to weld with his hammer the conflicting interests; and after four years of legislative labors, the Civil Code was achieved in 1804, and the others a few years later; there were five in all,—Civil, Criminal, Commercial, and Civil and Criminal Procedure. The chief figures who stand out in this final stage were Portalis and Tronchet,<sup>39</sup>—one the philosophic jurist, the other the skilled practitioner.

The composition of these codes was the most rational and thorough proceeding of its kind in all history up to that time. Justinian's undertaking had been in comparison a superficial and mechanical task. This one was a model of representative political method. The entire bench and bar of France took part; scores of professional meetings were held; hundreds of reports were filed; the



XV. 37—CAMBACÉRÈS, MINISTER OF JUSTICE UNDER NAPOLEON



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CORPS LEGISLATIF.

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PROJET  
DE  
CODE CIVIL,

PRÉSENTE

AU CONSEIL DES CINQ-CENTS,

Au nom de la commission de la classification  
des lois,

PAR CAMBACÈRES,

DÉPUTÉ PAR LE DÉPARTEMENT DE L'HÉRAULT.

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A PARIS,  
DE L'IMPRIMERIE NATIONALE.

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MESSIDOR, AN IV.

XV. 38—CAMBACÈRES' DRAFT OF A CIVIL CODE

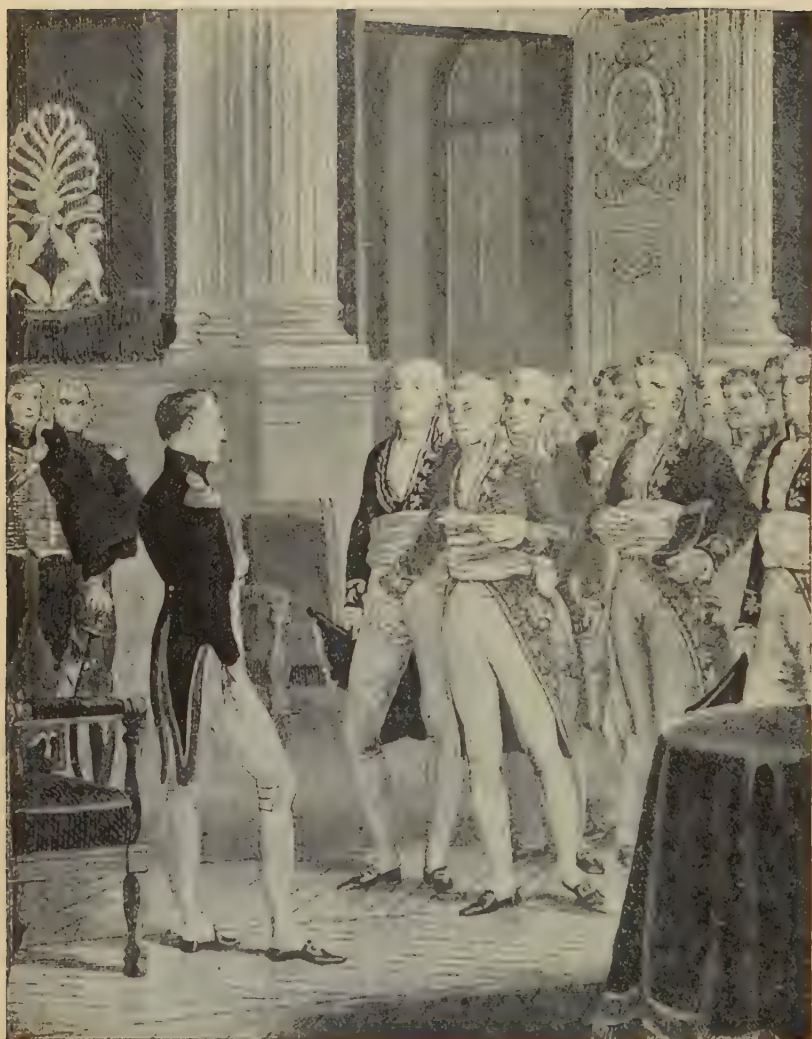
[1029]





XV. 39—PORTALIS AND TRONCHET  
Leaders in the composition of the French Civil Code





XV. 40—NAPOLEON RECEIVING THE CODE

### 13. *Napoleon's Codes*

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drafts were debated in successive stages in various legislative bodies. The printed proceedings on the codes fill forty volumes.

Napoleon himself presided officially at many of the debates, and his will shaped more or less of the code.<sup>40</sup> In one case he directed the council to report out the draft within fifteen days; but when it proved that the report of the obstinate jurists went counter to his will, he adjourned the debates on that topic for three years, hoping, though in vain, for a change of professional opinion. In his later days, as a captive at St. Helena, he said: "My glory is not to have won forty battles; for Waterloo's defeat will destroy the memory of all those victories. But what nothing will destroy, what will live eternally, is my Civil Code".

That code stands out as one of those few books which have influenced the whole world.<sup>41</sup> The Code Napoleon was soon translated into almost every language. It set the fashion, and the other Romanesque countries of Europe were ripe to follow. In all of them the task was similar,—to extinguish the thousand local law-codes, "fueros" in Spain, "statuta" in Italy, "keuren" in Netherlands, "stadtrechte" and "landrechte" in Germany and Austria, "cantonrechte" in Switzerland; and to weld

# CODE CIVIL

DES

## FRANÇAIS.

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ÉDITION ORIGINALE ET SEULE OFFICIELLE.

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A PARIS,  
DE L'IMPRIMERIE DE LA REPUBLIQUE.  
AN XII. — 1804.

XV. 41—CODE NAPOLEON, FIRST EDITION

[ 1032 ]



### 13. *Napoleon's Codes*

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them with the Roman Common Law into a single Romanesque system.

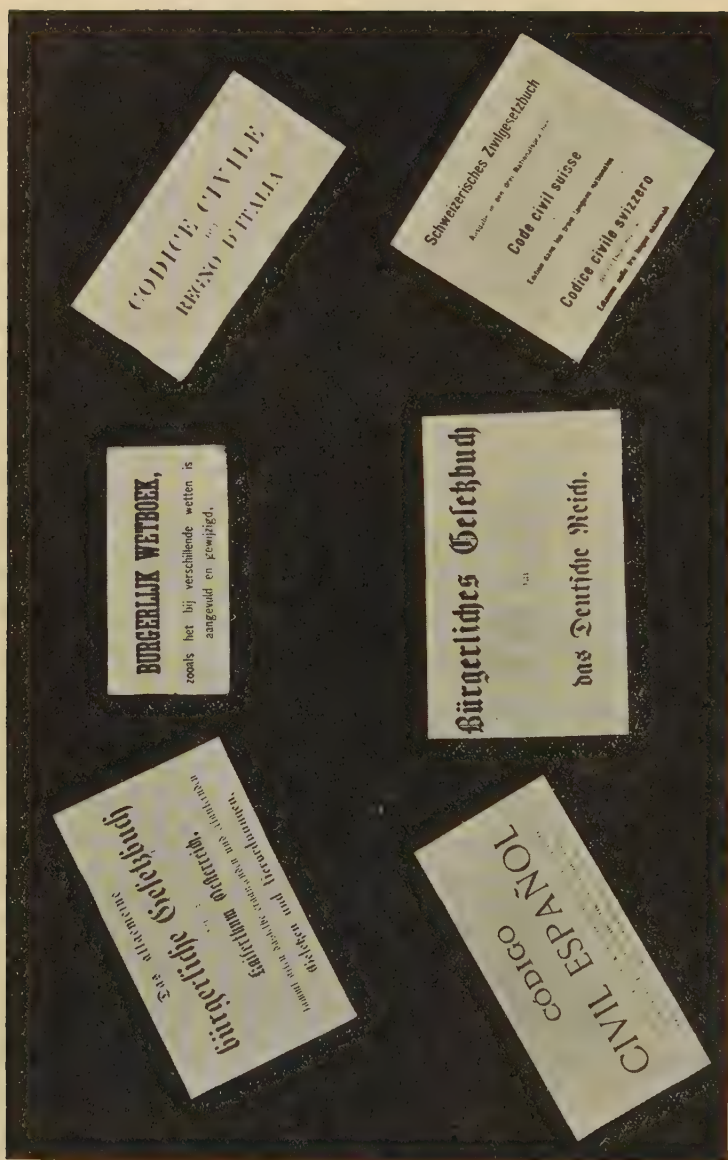
The first to complete the task was Austria in 1811; then followed Netherlands in 1838; Italy in 1865; Spain in 1888; Germany in 1896; and Switzerland in 1907.<sup>42</sup> Eight centuries had elapsed from the Resurrection of Roman law in the 1100's to the final Formulation of Romanesque law in the 1800's.

#### (IV) FOURTH PERIOD

14. But this was not the end of its destiny. Its fourth period was to arrive,—the period of expansion. This period of expansion was now to make it one of the modern world's three great systems.

The Islamic law had become a world-system through religious expansion; the original Roman law had spread by military conquest; the Anglican law by colonization. But the Romanesque system was not extended by conquest nor by religion nor by colonization. Two main influences shaped its destiny,—one scientific, the other political.

In the first place, every law-faculty in Continental Europe had for centuries been teaching Roman law as universal legal science. In the second place, the French Revolution had associated in men's minds national



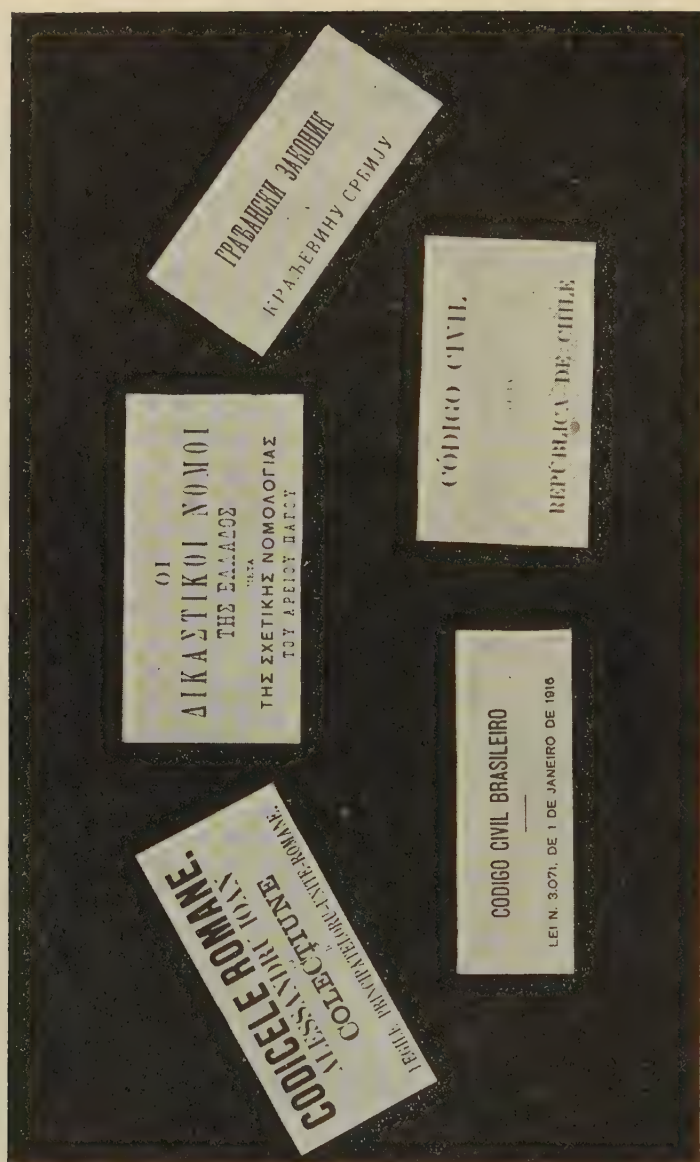
XV. 42—CODES OF AUSTRIA, NETHERLANDS, ITALY, SPAIN, GERMANY, SWITZERLAND

## 14. *Expansion of Romanesque Law*

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codification with political reform. As a result of the former or scientific influence, the legal thought of all the remaining Continental countries was moulded more or less in Romanesque form;<sup>43</sup> in the case of Roumania, Hungary, Greece, Serbia, Bulgaria, this is notable; and even in the Germanic codes of Denmark, Norway, Sweden, and the Slavic code of Russia, modern Romanesque teaching is noticeable. As a result of the second or political influence, the new nations of Latin-America, on achieving independence in the early 1800's, proceeded to codify their national law; and as no Spanish code then existed, the Code Napoleon was naturally the chief model.<sup>43</sup> Scotland was already Romanesque; so, too, was Dutch South Africa, Quebec, and Louisiana; even Islamic Turkey and Egypt came to adopt in part the French legal scheme; and Japan in the 1900's used Romanesque models.

How marked is the community of legal ideas and phrases running through all these Romanesque codes may be seen by taking almost at random the parallel texts on some one subject: Art. 7 of the French Civil Code reads: "The exercise of civil rights is independent of citizenship, which is acquired and kept only as prescribed in the Constitution." Art. 6 of the Roumanian Civil Code reads: "The exercise of civil rights does not depend on



XV. 43—CODES OF ROUMANIA, GREECE, SERBIA BRAZIL, CHILE

## 14. *Expansion of Romanesque Law*

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citizenship, which can be acquired and kept only as prescribed in Art. 16 of this Code." And so on:

### *Parallel Texts from Civil Codes*

#### *France*

##### Book I. Persons

Art. 7. "The exercise of civil rights is independent of citizenship, which is acquired and kept only as prescribed in the Constitution."

Art. 8. "Every Frenchman enjoys civil rights."

#### *Roumania*

##### Book I. Persons

Art. 6. "The exercise of civil rights does not depend on citizenship, which can be acquired and kept only as prescribed in Art. 16 of this Code."

Art. 7. "Every Roumanian enjoys civil rights."

#### *Greece*

##### Book I. Persons

Art. 9. "The enjoyment of civil rights is independent of citizenship, which is acquired and kept only according to the Constitution."

Art. 10. "Every Greek enjoys all civil rights."

#### *Serbia*

##### Preliminary

Art. 6. "Even an alien, dealing with Serbians or with other aliens in Serbia, may acquire rights under its laws."

Art. 5. "Every Serbian citizen, whether within or without Serbia, enjoys and is subject to Serbian law."

#### *Chile*

##### Book I. Persons

Art. 57. "The law recognizes no difference between the Chilean and the alien as to the acquisition and enjoyment of civil rights under this Code."

#### *Brazil*

##### Book I. Persons

Art. 3. "The law does not distinguish between citizens and aliens as to the acquisition and enjoyment of civil rights."

Art. 2. "Every man is capable of civil rights and obligations."

The most grandiose edifices of Justice in the modern world are monuments to that system,<sup>44</sup> which has trans-fused the pure Roman and Germanic systems into a new and composite one.<sup>45</sup> The elements supplied by the two





r5102 Bruzelles - Palais de Justice



XV. 44—PALACES OF JUSTICE AT ROME AND BRUSSELS



XV. 45—PALACES OF JUSTICE AT BUENOS AIRES AND BUDAPEST



XV. 46—WORLD-MAP OF THE ROMANESQUE SYSTEM

The areas in light shading represent spheres of influence; those in darker shading represent a complete system of laws. The exact boundaries cannot be adequately shown on this map. The map in the Appendix attempts to show them more closely

#### 14. *Expansion of Romanesque Law*

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systems differ in ratio in different countries. Scholars agree, for example, that the French Civil Code, oddly enough, is more Germanic than it is Roman, while the German Civil Code is more Roman than Germanic. But both of these, and all of the others, may be termed Romanesque, in clear contrast to the other two modern world-systems, the Islamic and the Anglican.

The Romanesque system has belted the world from Quebec to Cairo, from Budapest to Buenos Aires.<sup>46</sup> Three hundred millions of people now live under it. Of the three world-systems of today, this one is the most extensive; it governs almost one-sixth of the world's inhabitants.





## Sources

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### *Sources of Illustrations*

1. *Bologna*. From a photograph by *Pini*, Bologna.
2. *The Feudal Fighting-Towers of Medieval Pavia*. From a photograph by *Bruni-Marelli*, Pavia, of an old engraving. In the Provincial Council's book cited below in Note 3, are several engravings by *Alfredo Baruffi*, with striking examples of these abundant fighting towers in Bologna.
3. *Irnerius*. From a photograph, made for the author in 1908, of the fresco by *Luigi Serra*, on the ceiling of the Provincial Hall in Bologna. There is a splendid reproduction in the handsome book published in 1933 by the Bologna "Provincial Council of Corporate Economy" to celebrate the fourteenth centenary of the promulgation of Justinian's Digest.
4. *Justinian's Digest*. From the photo-facsimile of the MS. in the Laurentian Library at Florence (cited *ante*, Chap. VII).
5. *Square of San Stefano*. From a photograph by *Pini*, Bologna.
6. *Law Lecturer and His Class*. From a photograph, by the *Emilia Co.*, Bologna, of the relief on the sarcophagus of Pietro Canonici, lecturer on Civil Law, in the Civic Museum at Bologna.
8. *Bologna Student Records (interior page)*. From the reproduction in *E. E. James*, "Bologna, Its History, Antiquities, and Art", p. 176 (London, Frowde, 1909).
10. *Tomb of a Jurist*. From a photograph, by *Pini*, Bologna, of the tomb of Rolandino dei Passagieri.
11. *Gloss on Justinian's Digest*. From p. 8 of a 1549 edition of the Digest, published by Hugo a Porta at Lyon.
12. *Justinian's Code*. From the title-page of the Koberger edition of 1488.
13. *Bartolus' Treatise on Alluvion*. From p. 144b of Bartolus' "Consilia", ed. 1552.
14. *Bartolus' Opinion on the Wine-Sale Statute*. From p. 200 of Bartolus' "Consilia", ed. 1552.
15. *Bartolus*. From an old engraving, anonymous.

## XV. Romanesque Legal System

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16. *Palace of Justice at Ferrara.* From a photograph by *Lunghini & Bianchini*, Ferrara.
17. *Palace of Justice at Padua.* From a photograph by *Matthiozzi*, Padua.
18. *Palace of Justice at Rouen.* From photographs obtained in Rouen.
19. *Palace of Justice at Paris.* From a photograph in *H. Stein*, "Le Palais de Justice et la Sainte Chapelle", p. 137 (Paris, Longuet, 1912).
20. *Session of Supreme Court, Paris.* From a photograph made for the author by *Giraudon*, Paris, of the painting by *Pierre Dumesnil*, at Versailles.
21. *The Tribunal of the Terror.* From a drawing etched by *Duplessi-Bertaux*.
22. *Salle des Pas Perdus.* From an old engraving, anonymous.
- 22a. *A Chancellor of France.* From an old lithograph, anonymous.
23. *The American Bar Association in the Palais de Justice.* From a photograph furnished by *Wm. D. Guthrie*, Esq., of New York, spokesman of the delegation in 1924.
24. *Map Showing the Shift of Primacy.* Prepared by the author from *J. Paul Goode's* Homolosine Projection Map, 101 H. C.
25. *Cujas.* From an old engraving by *Ratmann*.
26. *House of Cujas.* From a photograph by *Laussedat*, Chateaudun.
27. *Senate Hall at Leiden University.* From a photograph furnished by *Prof. C. Van Vollenhoven*, of Leiden, 1924.
28. *Noodt.* From an old lithograph, anonymous.
29. *Parliament Hall, Edinburgh.* From a photograph, obtained in Edinburgh, of a drawing by an unidentified artist.
30. *German Appeal Court, A. D. 1500.* From an old woodcut reproduced in *Henne Am Rhyn*, "Deutsche Kulturgeschichte", vol. II, p. 56 (cited *ante*, Chap. XII).
31. *Carpzov.* From an old engraving, by *Dürr*, of the painting by *Steger*.
32. *Opinion of Carpzov.* From his "Opus Decisionum", p. 78, ed. 1729.
33. *Windscheid, Von Ihering.* From photographs obtained in Germany.
34. *Dumoulin.* From an old engraving, by *Ficquet*, found at Tours.
35. *Colbert.* From an old engraving by *Nanteuil*.
36. *Pothier.* From an old engraving of the painting by *Le Noir*.
37. *Cambacérès.* From a lithograph by *Delpech* of the painting by *Maurer*.
38. *Cambacérès' Draft.* From the title-page of "Projet de Code Civil", year IV.

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39. *Portalis and Tronchet*. From engravings by *Mallin*, loaned by Mr. Edward Hertzberg, of Chicago.
40. *Napoleon Receiving the Code*. From an engraving, loaned by Mr. Hertzberg of Chicago, of the painting by *Philippoteaux*.
41. *Code Napoleon, First Edition*. From the title-page of the 1804 edition.
- 42, 43. *Codes of Austria, Roumania, etc.* From the title-pages of the books.
- 44, 45. Palaces of Justice in  
    *Rome*: from photographs by *Alinari*, Rome, taken for the author.  
    *Brussels*: from a photograph by the *Photoglob Co.*, Zürich.  
    *Budapest*: from a photograph by *Taussig*, Budapest.  
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## *XV. Romanesque Legal System*

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THE  
ANGLICAN  
LEGAL SYSTEM



## XVI

### *The Anglican Legal System*

#### *(I) Building a Common Law*

1. Diverse racial and feudal elements.
2. Unification—Insular location—William I, Henry II, Edward I.
3. Instinct for law and order—Bracton—Guilds of lawyers—Inns of Court—Year-books.

#### *(II) Rejecting the Romanesque Law*

4. Legal patriotism — Littleton, Fortescue, Coke.
5. A strong legal profession—Inns of Court.

#### *(III) Cosmopolitanization and Expansion*

6. Crudity of the 1400's.
7. Science and learning of the 1600's—Coke, Bacon, Selden.
8. Commercial and colonial expansion — Mansfield, Blackstone.
9. Anglican law belting the globe—The American Bar Association in London, 1924—Role of a professional class in maintaining a legal system.





## XVI

# The Anglican Legal System



O picture the history of the Anglican legal system is not within the present plan. But after what has been described of the other systems, something may be added to outline the answers to some natural questions.

Those questions are three: (I) Since England was settled by Germanic tribes, can Anglican law be deemed worthy of ranking as an independent system, not merely a branch of Germanic law? And (II) Why did not the resurrection of Justinian's law texts in the 1100's-1400's transform local law into Romanesque law, as it did in the rest of western Europe? And (III) How did English law come to be Anglican law, i. e. a world-system?

One may at least call to mind here the places, the men, and the documents that illustrate the answers to these three questions. And the story may be divided into three periods, corresponding to the three questions. The first period, A. D. 1100-1400, is the period of building a new common law of England. The second period, A. D. 1400-1600, is the period of rejecting the Romanesque law. And the third period, A. D. 1700-1900, is the period of becoming a world-system.

## *XVI. Anglican Legal System*

CHART OF PERIODS: ANGLICAN LEGAL SYSTEM

| Date                 | Phases                                                 | Events                                                            |
|----------------------|--------------------------------------------------------|-------------------------------------------------------------------|
| 1100<br>1200<br>1300 | I. Period of<br>BUILDING A COMMON<br>LAW               | William I—Edward I<br>Bracton—Inns of Court<br>Year-Books         |
| 1400<br>1500<br>1600 | II. Period of<br>REJECTING THE<br>ROMANESQUE LAW       | Fortescue—Coke—<br>Inns of Court                                  |
| 1700<br>1800<br>1900 | III. Period of<br>COSMOPOLITANIZATION<br>AND EXPANSION | Coke—Bacon—Selden—<br>Colonial Expansion—<br>Mansfield—Blackstone |

### (I) FIRST PERIOD

One could hardly have predicted that this island, successively overrun by Kelts, Romans, Danes, Saxons, and half-Romanized Northmen, was ever to have an indigenous unified territorial law of its own shaping. But several powerful circumstances, in the haphazard of history, coincided to produce that result very early.

1. In the first place, it was an island, and therefore isolated, and thus its peoples and customs tended to unity.

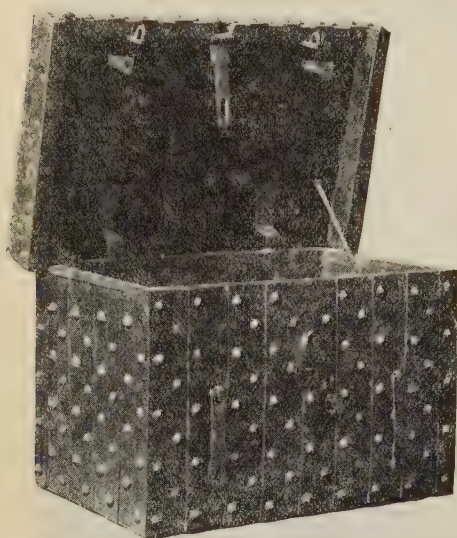
2. In the next place, its first Norman overlord, William I,<sup>1</sup> was a man who, in the multifold chances of the variation of species, happened to possess the compelling trait of political mastery and system. At the very outset, William conceived of his island as a strong centralized



XVI, 1—WILLIAM I

## *XVI. Anglican Legal System*

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XVI. 2—DOMESDAY BOOK CHEST

feudalism, not the usual feeble decentralized one. Domesday Book and Westminster Hall are the typical monuments of this idea.

Domesday Book (one may still see the chest in which it long reposed)<sup>2</sup> was his great measure for this centralization; it is called by Mait-

land "the most magnificent of William's feats". There is nothing like it in Continental Europe. It surveyed and listed, in A. D. 1085, all of William's new island possessions, for the purpose of taxation; and the theory back of it was that every acre of land was held, immediately or mediately, of him, the one central overlord.<sup>3</sup>

William, in the next two centuries, had two forceful successors like himself, Henry II and Edward I. These leaders, by their legislation, put an end in England to that kaleidoscopic conglomeration of petty separate baronial jurisdictions of law and custom which (as we



TERRE WITH DE SCORIES

[illegible][illegible][illegible]

xxv. 2. TERRA VITTI FILII NORMAN. by Rachel H.

[illegible][illegible]

The entry in the lower right-hand corner records lands in Herefordshire held by Turstin Fitz Rolf, who thus became lord of Wigmore Castle (still standing, in ruins). This Turstin carried the banner of William at the battle of Hastings



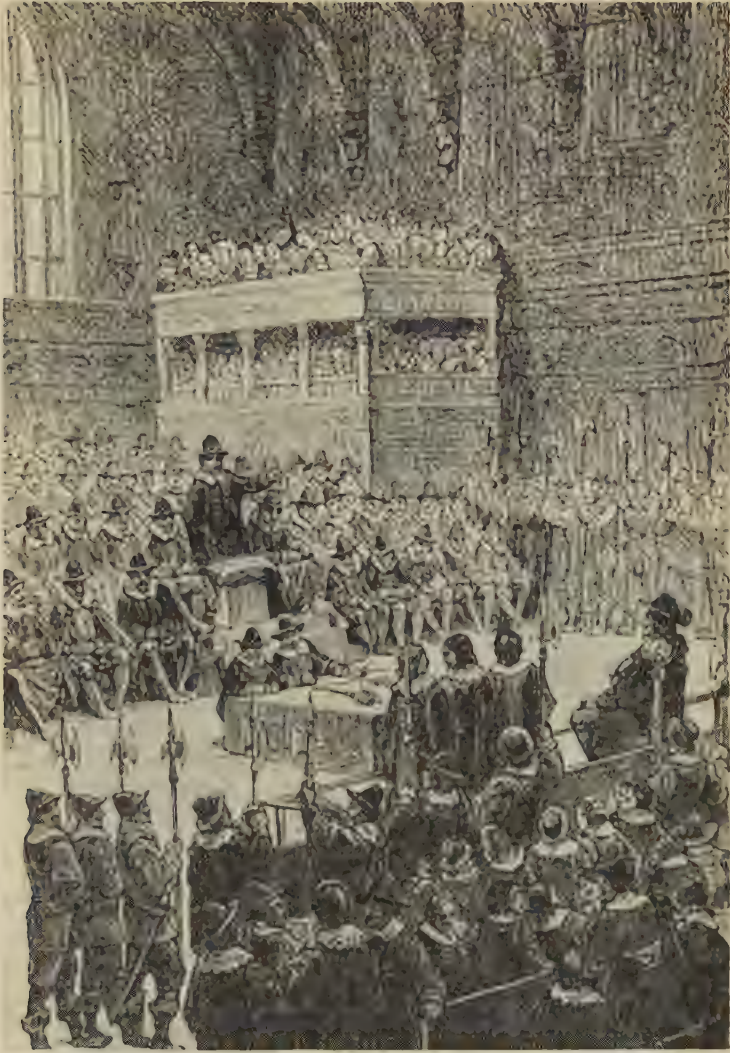
## *XVI. Anglican Legal System*

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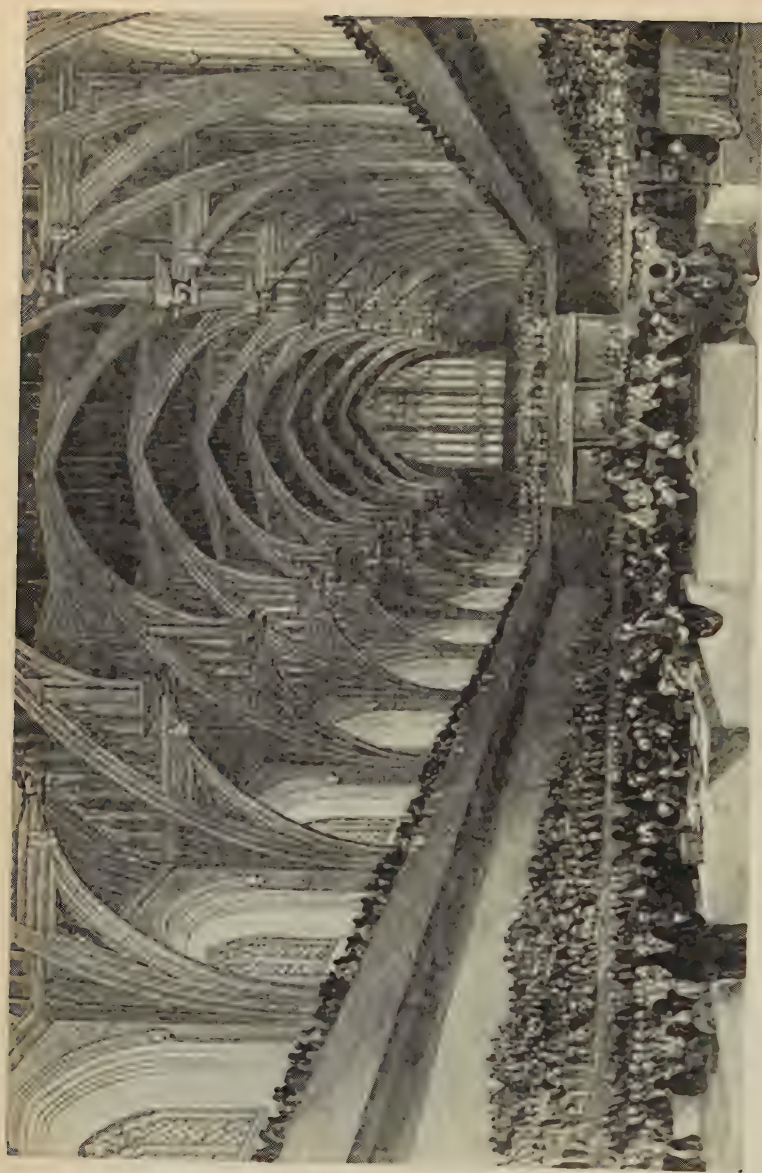
have already seen, in Chap. XII) prevailed on the Continent for six whole centuries later. No common law could have grown up in England under such conditions. These men and their advisers put England six centuries ahead of the Continent by centralizing justice and nationalizing it.

The second typical monument of that centralization was Westminster Hall. Built originally in A. D. 1099 by William Rufus as a banquet hall, and occupied as a central court of justice after A. D. 1300, it is the oldest and the second largest court-house ever built in Europe,—two hundred and ninety feet long, seventy feet wide, and ninety feet high; and for six centuries it served as the chief palace of justice for England. During those ages it has witnessed the trial of an English King for his life;<sup>4</sup> of Wallace, the Scots hero; of Warren Hastings, an imperial governor;<sup>5</sup> and numerous other momentous dramas in the annals of English justice.

3. But a third great circumstance that made an English common law possible was again one of those chances in the variation of species that give variety to evolution; for Rollo's particular tribe of Norsemen that had settled in France and then came over to England must have possessed as a tribe in a marked degree the trait of law and order,—that rare trait which distinguished



XVI. 4—TRIAL OF KING CHARLES I IN WESTMINSTER HALL



XVI. 5—TRIAL OF WARREN HASTINGS IN WESTMINSTER HALL



### 3. *Norman Legalistic Instinct*

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Romulus' tribe in early Italy and Mohammed's tribe in Arabia, and by which those peoples stood out in history ever after. The Normans in England seemed to take naturally to law in all its phases, both legislative and justiciary. A foreign traveler in England, as early as the 1100's, records with surprise that "England was wholly given over to the study of law". At the time of the Conquest, almost every monastery possessed its legal adviser. The commissioners sent by William to supervise the administration of justice in the counties numbered "men learned in the Saxon laws." Crowds of civilians and canonists swarmed across the Channel for the express purpose of practising and teaching law. Archbishop Lanfranc, from the Abbey of Bec in Normandy,<sup>6a</sup> and William's great political adviser, had been in his youth a brilliant jurist at Pavia in Italy;<sup>6</sup> and his pupil and successor, The-



XVI. 6—ARCHBISHOP LANFRANC  
He was the chief legal adviser of William I

[ 1061 ]

## *XVI. Anglican Legal System*

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obald, when elected archbishop of Canterbury, attached to his household many young men who eagerly occupied themselves with legal studies; Peter of Blois, his secretary, has left a description:<sup>a</sup>

“In the house of my master, the Archbishop of Canterbury, there are a set of very learned men expert in the rules of justice as well as other parts of prudence and knowledge. It is their constant custom after prayers, and before they dine, to exercise themselves in reading, in disputations, and in the discussion of legal causes. To us all the knotty questions of the kingdom are referred; which being brought forth into the auditory, where all the company assembles, everyone according to his rank whets his understanding to speak well, without wrangling or obloquy, and with all the acuteness and subtlety that is in him declares what he thinks the most prudent and sound advice. And, if it pleases God to reveal the best opinion to the lowest among us, the whole assembly agrees to it without envy or distraction.”

About A. D. 1144 Theobald sent for Vacarius, the celebrated civilian of Mantua, who became the Archbishop's advocate, and no doubt lectured on law to the archbishop's young men. Many other monks devoted themselves, not only to Civil Law, but to the Common Law, both in court and in the schools outside as well as within the walls of the monasteries. It even became a popular saying that “nullus clericus sine causidicus.”

One of the earliest products of this prolific interest in law was Bracton's great book, in the 1200's, “*De Legibus Angliae*.”<sup>1</sup> Bracton, a judge of long experience, wrote a





XVI. 6a.—THE ABBEY OF BEC, IN NORMANDY  
Here the great Lanfranc was abbot, presiding over 1500  
monks, before joining Duke William to  
help govern England



XVI. 7.—BRATTON COURT MANOR-HOUSE, IN SOMERSET  
Here Henricus de Bracton is said, by current tradition, to  
have lived when working upon his book "De Legibus"

## *XVI. Anglican Legal System*

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book which had wide vogue, and made it possible for the royal judges to unify the customary law of England. Bracton read and used Justinian's law-books, which had just been resurrected in Italy a century before. But he composed most of his text from his observations of cases decided in court. So his book represented in substance a native English, not a Romanesque, practice of law.<sup>8</sup>

But what made such a practice possible? A profession of law, already developing in the Inns of Court. These Inns had begun early in the 1300's; they were the guilds of lawyers that grew up around the courts at London. Only four now survive,—Lincoln's Inn, Gray's Inn, Inner Temple, and Middle Temple;<sup>9</sup> the last two were so called from occupying the old quarters of the Knights Templars. But there were fourteen or more in all, at the height of their activity, and there were probably some two thousand members in all, each year.

The most distinctive result, then, of this Norman zest for law was that a legal profession arose at least two whole centuries before it did in Germany, Netherlands, and Scandinavia, the other pure Germanic countries.

The Inns of Court were guilds of lawyers with their apprentices, because every occupation was in those days organized in a guild. The apprentices of law lodged and ate and studied together in these Inns.<sup>10</sup> They were like







XVI. 9.—MAP OF THE INNS OF COURT TODAY

### 3. *Inns of Court*

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the colleges at Oxford and Cambridge and the dormitories and fraternity houses in a modern American university. The incipient study of English law at Oxford and at Cambridge Universities was virtually abandoned. The Inns of Court became universities of law, and they were indeed so called by Chief Justice Fortescue, in the late 1400's, and by Chief Justice Coke in the 1600's. One of the courts—the Chancellor's Court—was for a time held in the very hall of one of the Inns, Lincoln's Inn.<sup>11</sup> Lectures were given and moot cases argued for the apprentices by lawyers of experience; and that experience was founded on practice in the courts.

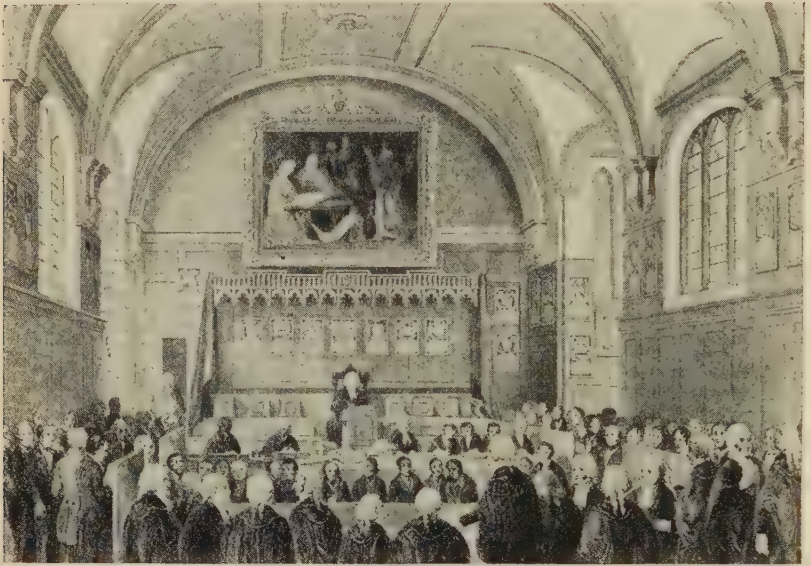


XVI, 10—THE LIBRARY, INNER TEMPLE



## XVI. *Anglican Legal System*

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XVI. 11—THE CHANCELLOR'S COURT, HELD IN LINCOLN'S INN

For seven years, usually, this education must continue. A contemporary description of the educational program of the early 1600's exhibits the strong fraternal and professional bond that united apprentices and seniors in a common routine of almost monastic daily intercourse:<sup>b</sup>

[*Education at the Inns of Court.*] "Utter Barristers are such as from their learning and standing are called by the Benchers to plead and argue in the Society doubtful cases and questions, which are called Moots, and whilst they argue the said cases, they sit uttermost on the Forms of the Benches which they call the Bar. All the rest of the Society are accounted Inner Barristers, who for want of learning or time are not to argue in these Moots. Yet in a Moot

### 3. *Inns of Court*

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before the Benchers, two of these, sitting upon the same Form with the Utter Barristers, do for their Exercises recite by heart the Pleading of the same Moot Case in Law French; which Pleading is the Declaration of the said Moot Case at large; the one taking the part of the Plaintiff, and the other of the Defendant. For the times of these Mootings, they divide the Year into three parts, viz. (1) The Learning Vacation, (2) the Term Times, and (3) the Dead or Mean Vacation. They have two learning Vacations, namely, Lent, which began the 1st Monday in Lent and continued 3 weeks and 3 days, and Summer Vacation, which began the Monday after Lammas Day and continued also 3 weeks and 3 days. And in these Vacations are the greatest conferences and Exercises of Study. In the Term Time the only Exercises of Learning are arguing and debating cases after dinner and Mooting after supper in the same manner as in the Vacations. The time between the Learning Vacations and Terms is called the Mean Vacation, during which time every day after dinner cases are argued as at other times, and after supper Moots are brought in and pleaded by the Inner Barristers, in the presence of the Utter Barristers which sit there in the room of the Benchers."

And these daily mootings—a rigorous form of educational method, which by the genius of a modern American, Langdell, has been restored into universal practice in law schools—occupied a formal and impressive status in the life of the Inns. Here is a chronicle of their procedure:

[*A Mooting at the Inns of Court.*] "Immediately after Supper the Benchers assemble themselves in the Bay-window, at the upper end of the Hall; where, standing in order, according to their antiquity, there repairs unto them two Gentlemen under the Bar, whose turn it is to recite the Pleadings. Who, after a low obeysance, demand whether it be their pleasure to hear a Moot; and depart

## XVI. *Anglican Legal System*

with an affirmative answer. Then the Benchers appoint two amongst themselves, to argue the Case, besides one of the Readers elect, who stands not in their assembly, and is to be allways one (as hath been said). Wherein note, that every man is appointed according to his turn as thus; The Benchers of this Society are divided into two several ranks or Classes; viz. the upper Classes, consisting of the Auncienty, and the lower of the Puisnes. Now at the first Moot of every tourn, the Puisne of the lower rank, and the puisne of the upper rank, are first to argue, and so afterwards of the rest in their turns. Which Order was (as it seems) devised, to the end every Bencher might once in a Term argue at one of those Mootes. When it is agreed on who are to argue, all the Benchers depart out of the Hall, leaving the rest of the Company there. The two Arguers walk a turn in the Court or Garden, untill the Hall be



XVI. 12—KING'S BENCH WALK

prepared and made ready for them;<sup>12</sup> which being done, they return into the Hall, and stay at the Cup-board, demanding if the Moot-men be ready . . . . . All parties being ready, the two Benchers appointed to argue, together with the Reader elect, take their places at the Bench Table, the auncient Bencher sitting in the midst, the second on his right hand, and the Reader elect on his left. Then the Moot-men also take their place, sitting on a Form, close to the Cup-board, and opposite to the Benchers. On the one side of them sits one of the Students, that recites the Pleading; and the other on the other side. The Pleadings are first recited by the Students;





|                   |                            |
|-------------------|----------------------------|
| <b>A</b> ccoupte. | Account.                   |
| ddition.          | Addition.                  |
| Amisqates.        | Amisqates.                 |
| Age.              | Age.                       |
| red.              | Red.                       |
| Aud de Roy.       | Aud de Roy.                |
| adon o lestar.    | Adon o lestar.             |
| Audon o le cas.   | Audon o le cas.            |
| Amesuyement.      | Amesuyement.               |
| Amercements.      | Amercements.               |
|                   | Amite.                     |
|                   | Arbitrement.               |
|                   | Assise.                    |
|                   | Assigne.                   |
|                   | Attachment.                |
|                   | Attent.                    |
|                   | Attomay.                   |
|                   | Attornement.               |
|                   | Uncien. de <sup>ne</sup> . |
|                   | Audita que pla.            |

# XVI. 13—THE COURT OF COMMON PLEAS

The white caps, or coifs, seen on the heads of the judges and some of the lawyers, are the insignia of the serjeants-at-law



### 3. *Inns of Court*

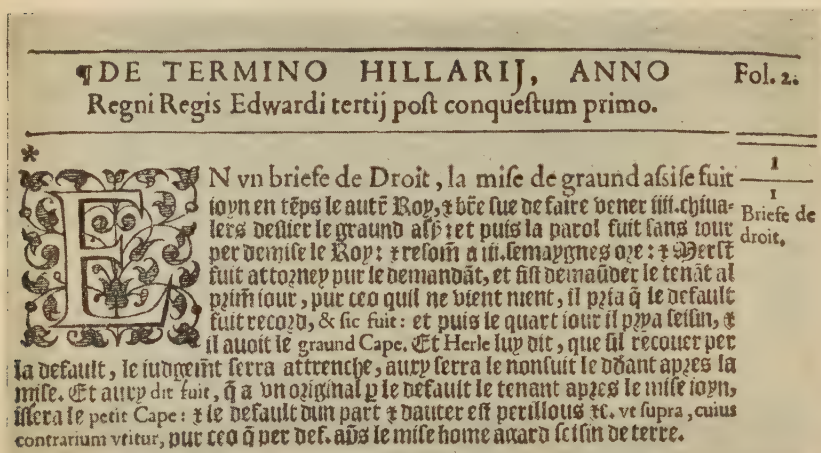
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then the Case put, and argued by the Barristers, and lastly by the Reader elect and Benchers, in manner aforesaid; who all three argue in English: but the Pleadings are recited, and the Case argued by the Utter-Barristers, in Law French. The Moot being ended, all parties return to the Cup-board; where the Moot-men present the Benchers with a Cup of Beer, and a slice of Bread: and so the Exercise for that night is ended. So that no man, though of never so great antiquity in the House, is privileged from keeping the Exercises of the House; those only excepted, which are past their Reading, and have never Read."

In a view of the Court of Common Pleas (which Coke called the "lock and key of the law"), at the end of the 1400's, the white caps or coifs, seen on the judges and some of the lawyers, are the insignia of the serjeants-at-law, or senior leaders of the bar.<sup>13</sup> Now no one could be appointed a judge unless he was already a serjeant-at-law; and every serjeant-at-law, on first being made serjeant, must give a course of lectures on the law to the apprentices. And so we see the study and teaching and practice and judging of the law systematically organized in a hierarchy of the profession.

And the materials for knowing this practice were already copiously recorded in manuscript reports of cases decided by the courts—the Year-Books.<sup>14</sup> These were printed as soon as printing came into vogue, at the end of the 1400's; but they had long circulated in manuscript.<sup>14a</sup> These handbooks of the profession, by providing a com-

## XVI. *Anglican Legal System*



XVI. 14—A PASSAGE FROM A PRINTED YEAR-BOOK

mon and continuous record of the practice, made possible the development of a genuinely English law. They cover nearly three centuries, from about A. D. 1270 to 1530. During this whole period we find nothing comparable to them, in any other country north of Italy.

Two typical cases, short and simple, from their earliest period, are worth comparing with the contemporary court records in the other Northern peoples,—Germany, Bohemia, Poland (*ante*, Chaps. XI, XII):<sup>d</sup>

[*A Year-Book Case A. D. 1308.*] “Robert Dumfraville brought his writ of debt against Richard of Lonstede and demanded a hundred marks, in which [the defendant] had bound himself in case he should not deliver a certain writing to [the plaintiff] on a certain day, on which day [default was made].

### 3. Year-Books

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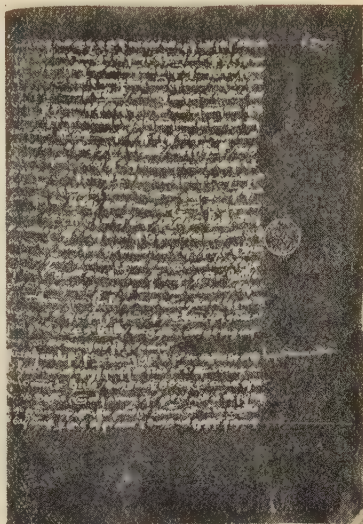
"*Westcote* [for defendant]. To this writ he ought not to be answered, for we have often tendered you the writing, and do so still. See it here! And always we have been ready, etc. We demand judgment.

"*Passeley* [for plaintiff]. You did not tender it on the day named in the writing whence our action arises. Judgment, whether we ought not to be answered.

"*Herele* [for defendant]. We also pray judgment, for you cannot deny that we have tendered and still tender the writing, and are ready, etc.; and you cannot show that you were damaged for want of the writing: judgment. And on the day when we ought to have delivered it and for a quarter o a year afterwards we were in the East, and we left the writing at home with our wife for delivery to you.

"*Passeley* [for plaintiff]. If the writing were unconditional, your answer would serve for any free man; but the writing is conditional, and the condition gives us an action to demand this debt for an unfulfilled condition; and that it is unfulfilled [the defendant] cannot deny. We demand judgment as before.

"BEREFORD, J. You demand this debt because the writing was not delivered, and he says that before now he has tendered it, and that he was always ready, and that he tenders it now. Therefore it is well that you receive it. Moreover, this is not, properly speaking,



XVI. 14a—A YEAR-BOOK  
MANUSCRIPT

## XVI. *Anglican Legal System*

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a debt; it is a penalty; and with what equity (look you!) can you demand this penalty?

"*Passeley*. [The plaintiff] is here by attorney, and the attorney is here to receive the hundred marks.

"BEREFORD, J. [According to you then] you were appointed attorney to win only, and not to lose. I do not believe that he who received you [as attorney] received you in that form. Therefore accept the [tendered] writing.

"*Passeley*. I cannot do that unless under a judgment of the court. If the law will suffer it, we will do it gladly.

"BEREFORD, J. Were you to remain asking for our judgment, you would not come by your debt these seven years, for a judgment of the law is not to be given in that sort of way."

In this second case, two points of law are debated, and the judge's remark shows how the law was developing by precedents:

[*A Year-Book Case: Covenant of an Infant.*] Year Book 12 Richard II (1388), No. 5, Eldrich v. Quylter: "A man brought a writ upon the statute of laborers against another in London, and made declaration by Huls how one B. was retained in his service at the feast of St. John the Baptist in the tenth year to serve him for two years, and the said B. was in his service until the feast of All Saints then next ensuing; that he departed out of his service, and the defendant detains him, etc.

"*Gascoigne*, for the defendant, demanded judgment of his declaration since he has not said that he requested him, so that he has not assigned any wrong in him, wherefore he demanded judgment, etc.

"*Huls*. And we demand judgment, and we pray our damages, for default of response.

### 3. Year-Books

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"*Gascoigne*. He has assigned a tort, that he retains him, which tort it is necessary for him to pursue in his declaration and to allege that he requested him etc. so that if he had retained him *after* the request, then he did a tort, which he has not alleged in his declaration, wherefore judgment, etc.

"*Wadham* [on the same side]. Without a request it is not a tort, because this is the statute 'Licet saepius requisitus'.

"*THIRNING, J.* [to *Gascoigne*]. I marvel at you that you dwell so long upon such a novel matter, that never has been seen before this hour, because a thousand declarations of that kind have been made here and held good, wherefore you may take whatever response you choose, etc.

"Wherefore *Gascoigne*. Then we say that the defendant is resident in the vill etc. in the county of E., and we say that this same one who he supposes was retained with him was the son of the defendant and his heir apparent, and departed from him at which time he was only of the age of ten years, nor was he more than ten years old at the time he was retained and besides we say that when he departed from him he was only of the age of eleven years, nor is he more now, wherefore he departed and returned to his father, and we demand judgment since he is of such an age if you should have this action.

"*Huls*. We say that at the time that he made covenant with us to serve us he was twelve years old and more and 'potens in corpore', in which case he was of an age to make a covenant, wherefore since you have admitted the retainer, we demand judgment, and we pray our damages.

"*Gascoigne*. And we demand judgment, since you have admitted that he was only of the age of twelve years, and so of such age that he cannot legally make a covenant for the tenderness of his age, wherefore judgment if you can maintain an action against us.

"And so to judgment."

[ 1075 ]





XVI. 15—WESTMINSTER HALL

#### 4. *Legal Patriotism*

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And so, what with William and his successors, and Domesday Book, and Westminster Hall,<sup>15</sup> and Bracton, and the Inns of Court, and the Year-Books, the close of the 1400's finds England with a single unified common law of its own,—a distinctive one, not merely a branch of the crude Germanic system.

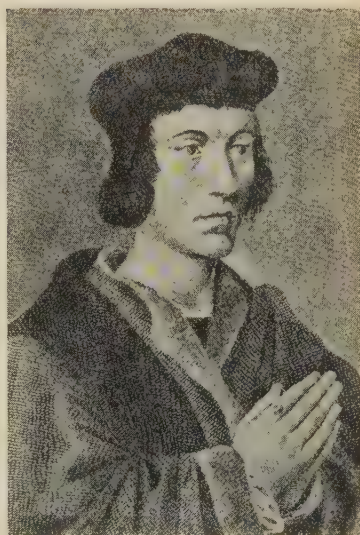
This marks a first period, answering our first question.

##### (II) SECOND PERIOD

But now, passing to the second question, Why did not English law succumb to the great flood of Romanesque law which gradually overwhelmed Germanic law elsewhere in western Europe after A. D. 1200?

The answer to this is found mainly in two ideas,—national patriotism, and a strong legal profession practising a unified common law.

4. The first idea is typified in Fortescue<sup>16</sup> and Coke. These men patriotically championed the native legal system. The spread of the Romanesque law on the Continent in the 1400's-1500's was associated with



XVI. 16—CHIEF JUSTICE FORTESCUE

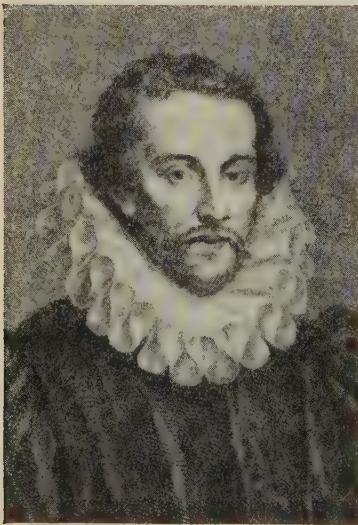
## *XVI. Anglican Legal System*

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the imperial plans of Charles V and the Papacy's claims of universal jurisdiction; and so the same political patriotism which supported Henry VIII's break with the Papal system was matched by a legal patriotism which inspired a devotion to the English legal system.

Chief Justice Fortescue's book, *De Laudibus Legum Angliae*, written about A. D. 1463, a popular book for laymen, was composed in praise of the laws of England; it invoked juristic patriotism, and pointed out the defects of the rival system.

In the next century another chief justice, Sir Edward



XVI. 17—CHIEF JUSTICE COKE

Coke,<sup>17</sup> equipped with prodigious learning, and blessed with aggressive energy, set himself to rout the invasion of Continental law-learning, which was then at its height in England. How real was this conflict of systems may be illustrated by a single incident,—an entertaining literary duel:

Chief Justice Littleton's famous book on *Tenures*, published in A. D. 1481, was the first book on English law

## 4. Fortescue and Coke

ever printed.<sup>18</sup> It was rather crude, compared with the Romanesque law-books of the day. It began with the celebrated sentence, "Tenant in fee simple is he which hath lands or tenements to hold to him and to his heirs forever". (Littleton's Tenures was almost memorized by the lawyers for three centuries thereafter; and in the 1700's a metrical version of this first sentence ran thus:

"Tenant in fee simple is he,  
And needs neither to shake nor shiver  
Who has his lands free from demands  
To him and his heirs forever.")

Now Sir Edward Coke's first great book was a commentary upon Littleton's book; he called it "Part One of the Institutes";<sup>19</sup> and Coke in his Preface had said that this book of Littleton's was "the most perfect and absolute work that ever was written in any humane science"! But the great French Romanesque jurist, Hotman, who visited England and at Queen Elizabeth's invitation was



### Fee simple.



Tenant in fee simple is he which hath Lands or Tenements to hold to him and to his heires forever: and it is called in Latine, Feodum simplex: for Feodum is called inheritance, and Simplex is as much to say as lawfull or pure, and so Feodum simplex, is as much to say, as lawfull or pure inheritance: For if a man will purchase Lands or Tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold unto him and to his heires: for these words (his heires) make the estate of inheritance. Anno 18. Henrici 8. fol 38. for if any man purchase Land in these words: To have and

XVI. 18—LITTLETON'S TENURES,  
PAGE 1



## XVI. *Anglican Legal System*

offered a position at Oxford, had publicly sneered at this same book of Littleton's; *he* called it a "clumsy, disorderly, and senseless piece of jargon"! This was a Romanesque lawyer's opinion of English law. And to this sneer Coke replied in kind. So it is easy to imagine the fervor with which the battle of the systems continued.

5. But the battle was a losing one from the start, for the Romanesque system. Here again, the Inns of Court typify the reason.<sup>20</sup> In the other Germanic regions, on the Continent, there was, as yet, no legal profession, no



XVI. 19—COKE UPON LITTLETON,  
FIRST EDITION



XVI. 20—CHANCERY LANE: GATE-  
WAY TO LINCOLN'S INN



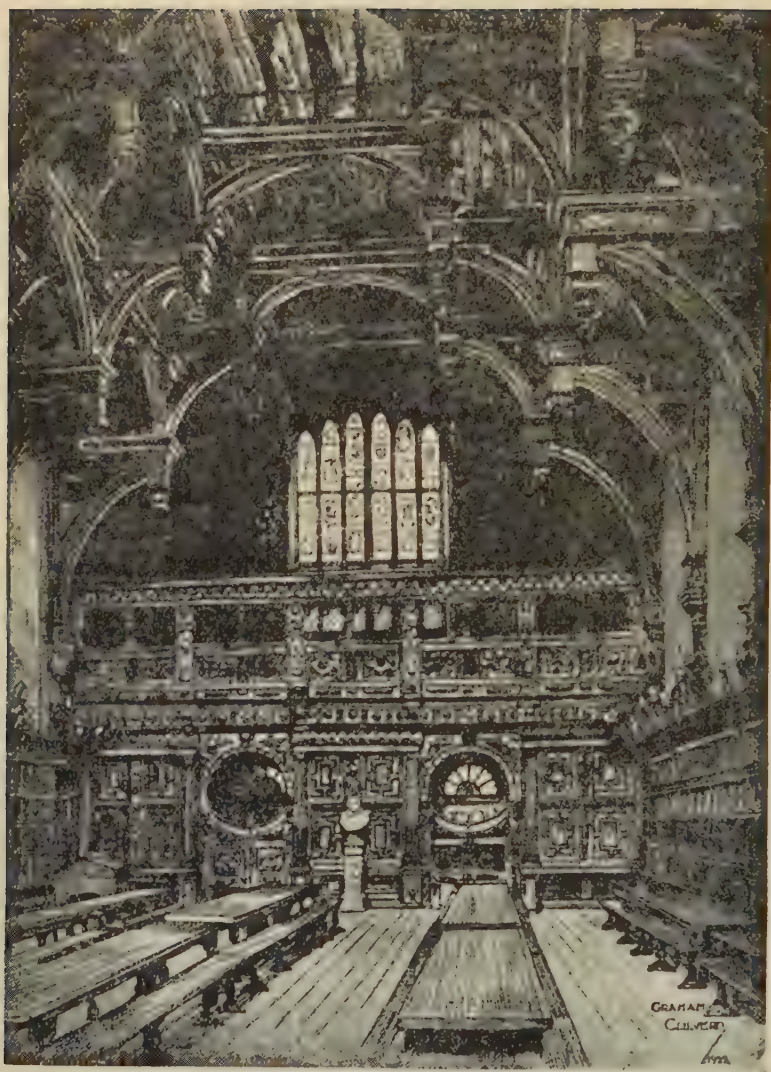
## 5. Inns of Court

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law schools, and no unified common law (*ante*, Chap. XII). There was thus no power sufficient to resist the inroads of the new hordes of doctors of law from Italy and France, bringing a highly developed science of a new common law of Rome. In England, on the other hand, this same period found English law already long unified, and technically studied and taught by a strong professional fraternity. "Taught law is tough law", said the modern English historian Maitland; that is one of the greatest truths in the history of law. The Inns of Court<sup>21</sup> were the fortress from which an army of professional devotees fought stubbornly in defence of English law.



XVI. 21—MIDDLE TEMPLE LIBRARY AND GARDENS



XVI. 22—MIDDLE TEMPLE HALL

## 5. Inns of Court

Moreover, this army represented the ruling class, socially and politically, and always had done so, since Norman times. "Only the sons of gentlemen", said Fortescue in his book, "do study the law in these hostels; there is scarce an eminent lawyer who is not a gentleman by birth and fortune". The great traditions of famous names cluster about all these Inns of Court.<sup>22</sup> In the Hall



XVI. 23—MIDDLE TEMPLE LANE

of the Middle Temple, Shakespeare's Twelfth Night received its first performance. In the Middle Temple lodgings<sup>23</sup> lived Plowden, Coke, Eldon, Campbell, Charles Russell, as well as Addison, Fielding, DeQuincey, Sheridan, Sir Walter Raleigh, Tom Moore. And in Brick Court lived Thackeray, Goldsmith, and Blackstone himself. The Temple also claimed an American colonist, Middleton of South Carolina, who was afterwards Chairman of the Committee of Five at Philadelphia to draft the Constitution of the United States. With the Inner Temple<sup>24</sup> are linked the names of Littleton, Ellenborough, Thurlow, Samuel Warren (author of "Ten Thou-



## *XVI. Anglican Legal System*



XVI. 24—INNER TEMPLE HALL

sand a Year'') and William Murray Lord Mansfield. And in Mitre Court Charles Lamb once lived. Originally the lawyers received their clients in the Temple Church,<sup>25</sup> each lawyer standing at his special pillar, just as they used to in the Palais de Justice at Paris. Lincoln's Inn counts among its past members William Penn, Tennyson, Oliver Cromwell, Daniel O'Connell, Brougham, Erskine, Disraeli, and Gladstone,—a brilliant galaxy. Mr. Tulkinghorn's chambers, in "Bleak House", were in Lincoln's Inn. And in a quaint corner of Staple Inn<sup>26</sup> Dr. Johnson once lived; but that is no longer a lawyer's building.

## 5. Inns of Court

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XVI. 25—TEMPLE CHURCH



XVI. 26—STAPLE INN

Thackeray's classical description of the Temple, when Arthur Pendennis, the embryo barrister, began his career there, a century ago, depicts for future generations the esoteric professionalism of life in the Inns of Court:°

*"The Knights of the Temple.* Colleges, schools, and Inns of Court still have some respect for antiquity, and maintain a great number of the customs and institutions of our ancestors, with which those persons who do not particularly regard their forefathers, or perhaps are not very well acquainted with them, have long since done away. A well-ordained workhouse or prison is much better provided with the appliances of health, comfort, and cleanliness, than a respectable Foundation School, a venerable College, or a



## *XVI. Anglican Legal System*

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learned Inn. In the latter place of residence men are contented to sleep in dingy closets, and to pay for the sitting-room and the cupboard (which is their dormitory), the price of a good villa and garden in the suburbs, or of a roomy house in the neglected squares of the town. The poorest mechanic in Spitalfields has a cistern and an unbounded supply of water at his command; but the gentlemen of the Inns of Court, and the gentlemen of the Universities, have their supply of this cosmetic fetched in jugs by laundresses and bedmakers, and live in abodes which were erected long before the custom of cleanliness and decency obtained among us . . . . . There is Pump Court and Fountain Court, with their hydraulic apparatus; but one never heard of a benchèr disporting in the fountain, and can't but think how many a counsel learned in the law of old days might have benefited by the pump.

“Nevertheless, those venerable Inns which have the Lamb and Flag and the Winged Horse for their ensigns have attractions for persons who inhabit them, and a share of rough comforts and freedom, which men always remember with pleasure. I don't know whether the student of law permits himself the refreshment of enthusiasm, or indulges in poetical reminiscences as he passes by historical chambers, and says, ‘Yonder Eldon lived—upon this site Coke mused upon Lyttleton—here Chitty toiled—here Barnwell and Alderson joined in their famous labours—here Byles composed his great work upon bills, and Smith compiled his immortal leading cases—here Gustavus still toils, with Solomon to aid him.’ But the man of letters can't but love the place which has been inhabited by so many of his brethren, or peopled by their creations, as real to us at this day as the authors whose children they were—and Sir Roger de Coverley walking in the Temple Garden, and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with the Scotch gentleman at his heels on their way to Dr. Goldsmith's chambers in Brick

## 5. *Inns of Court*

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Court; or Harry Fielding, with inked ruffles and a wet towel round his head, dashing off articles at midnight for the Convent Garden Journal, while the printer's boy is asleep in the passage. If we could but get the history of a single day as it passed in any one of those four-storied houses in the dingy court where our friends Pen and Warrington dwelt, some Temple Asmodeus might furnish us with a queer volume. . . . .

"On the first-floor, perhaps, you will have a venerable man whose name is famous, who has lived for half a century in the Inn, whose brains are full of books, and whose shelves are stored with classical and legal lore. He has lived alone all these fifty years, alone and for himself, amassing learning and compiling a fortune. He comes home now at night alone from the club, where he has been dining freely, to the lonely chambers where he lives, a godless old recluse. When he dies, his Inn will erect a tablet to his honour, and his heirs burn a part of his library. Would you like to have such a prospect for your old age—to store up learning and money, and end so?

"But we must not linger too long by Mr. Doomsday's door. Worthy Mr. Grump lives over him, who is also an ancient inhabitant of the Inn, and who, when Doomsday comes home to read Catullus, is sitting down with three steady seniors of his standing to a steady rubber at whist, after a dinner at which they have consumed their three steady bottles of port. You may see the old boys asleep at the Temple Church of a Sunday. Attorneys seldom trouble them, and they have small fortunes of their own.

"On the other side of the third landing, where Pen and Warrington live, till long after midnight sits Mr. Paley, who took the highest honors, and who is a fellow of his College, who will sit and read and note cases until two o'clock in the morning; who will rise at seven, and be at the pleader's chambers as soon as they are open, where he will work until an hour before dinner-time; who will come home from Hall, and read and note cases again until dawn next day, when

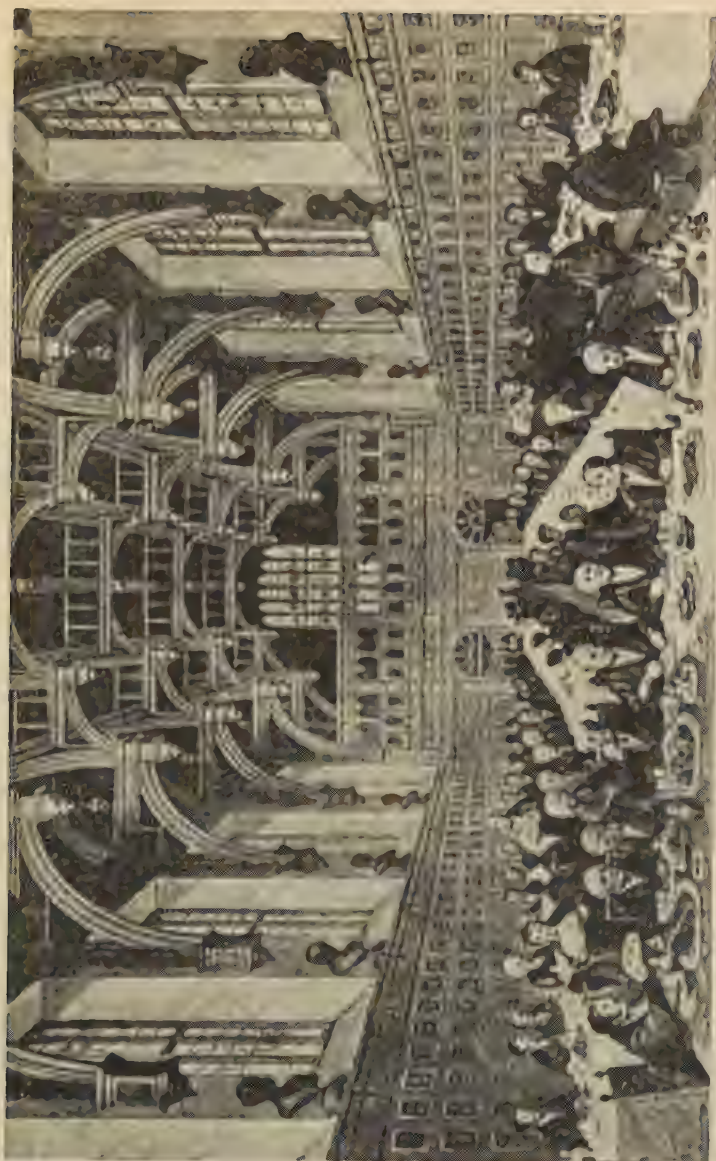
## *XVI. Anglican Legal System*

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perhaps Mr. Arthur Pendennis and his friend Mr. Warrington are returning from some of their wild expeditions. How differently employed Mr. Paley has been! He has not been throwing himself away; he has only been bringing a great intellect laboriously down to the comprehension of a mean subject, and in his fierce grasp of that, resolutely excluding from his mind all higher thoughts, all better things, all the wisdom of philosophers and historians, all the thoughts of poets—all wit, fancy, reflection, art, love, truth altogether—so that he may master that enormous legend of the law, which he proposes to gain his livelihood by expounding. . . . .

“Pendennis enjoyed the Temple life with a great deal of relish . . . . . A long morning’s reading, a walk in the park, a pull on the river, a stretch up the hill to Hampstead, and a modest tavern dinner . . . . . these were our young gentleman’s pursuits; and it must be owned that his life was not unpleasant. In term-time, Mr. Pen showed a most praiseworthy regularity in performing one part of the law-student’s course of duty, and eating his dinners in Hall. Indeed, that Hall of the Upper Temple is a sight not uninteresting, and (with the exception of some trifling improvements and anachronisms which have been introduced into the practice there), a man may sit down and fancy that he joins in a meal of the seventeenth century.<sup>27</sup> The bar have their messes, the students their tables apart; the benchers sit at the high table on the raised platform, surrounded by pictures of judges of the law and portraits of royal personages who have honoured its festivities with their presence and patronage.

“Pen looked about, on his first introduction, not a little amused with the scene which he witnessed. Among his comrades of the student class there were gentlemen of all ages, from sixty to seventeen: stout grey-headed attorneys, who were proceeding to take the superior dignity; dandies and men about town, who wished for some reason to be barristers of seven years’ standing; swarthy, black-eyed natives of the Colonies, who came to be called here before they



XVI. 27—DINNER IN THE TEMPLE



## *XVI. Anglican Legal System*

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practised in their own islands; and many gentlemen of the Irish nation, who make a sojourn in Middle Temple Lane before they return to the green country of their birth. There were little squads of reading students, who talked law all dinner-time; there were rowing men, whose discourse was of sculling matches, the Red House, Vauxhall, and the Opera; there were others great in politics, and orators of the students' debating clubs: with all of which sets, except the first, whose talk was an almost unknown and a quite uninteresting language to him, Mr. Pen made a gradual acquaintance, and had many points of sympathy."

And so, returning to our theme, it is easy to understand that, though the Romanesque law was then scientifically superior to English law, the alien system had no real chance of victory against a native legal profession so strongly entrenched—and entrenched!

Thus was English law predetermined to remain English and not become Romanesque; and our second question is answered. That question was: Why did not the resurrection of Justinian's law transform English law into Romanesque law, as it did the rest of Europe?

### (III) THIRD PERIOD

But, thirdly and lastly, how did English law become a world-system?

6. Let us admit frankly that in Coke's day English law still retained much of the crudeness of Germanic law. Littleton's book, and the other English law-books of that day, could not be compared with the Romanesque ones on



## 6. *Insularity of the 1500's*

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the Continent. Let us recall, for example, that as late as A. D. 1571, when Coke was already at the bar, the English Court of Common Pleas actually allowed the title to a piece of land to be decided by the old trial by battle, with hired champions—"that monstrous birth of ferocity and superstition", as Hallam calls it; and the description of the scene, with the rules of procedure, in Dyer's Report,<sup>28</sup> reads very like that in the Mirror of Saxony, composed more than three centuries earlier (*ante*, Chap. XII). Such law could in that condition never become a world-law.

What made English law cosmopolitan?

7. Five names,—Coke, Bacon, and Selden, Mansfield and Blackstone—typify the new era ushered in by the 1600's. For it was indeed a new era. This period was, as Maitland calls it, "the heroic age of English legal scholarship"; and the first three above names illustrate it. The English legal profession, partly as a result of the competition with Romanesque law, now produced some scholars who in the early 1600's proceeded to put science and learning into English law.

Of Coke's work, something has been said. Bacon<sup>29</sup> applied to law the same powerful methods of science which he brought into other fields; and he was the first to discuss English law in universal terms. Selden<sup>30</sup> was, in John Milton's words, "the chief of the learned men re-

### Trinity Term, 13 Queen Elizabeth.

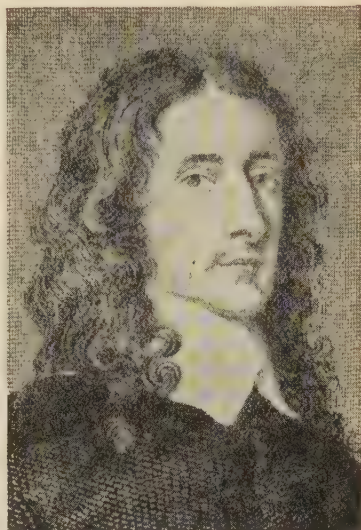
So the first verdict was affirmed, and the demandants barred in the attaint. And upon this the demandants brought a writ of right, and counted upon their own seisin in the time of the King and Queen, *P. and M. &c.* And *Paramour* chose the trial by battle, and his champion was one *George Thorne*; and the demandants *e contra*, and their champion was one *Henry Nailer*, a master of defence. And the Court awarded the battle; and the champions were by main-prise and sworn (*quære* the form of the oath) to perform the battle at *Totbill*, in *Westminster*, on the *Monday* next after the morrow of the *Trinity*, which was the first day after the *Utas* of the Term, and the same day given to the parties; at which day and place a list was made in an even and level piece of ground, set out square, *s.* sixty feet on each side due East, West, North, and South, and a place or seat for the Judges of the Bench was made without and above the lists, and covered with the furniture of the same Bench in *Westminster Hall*, and a bar made there for the Serjeants at law. And about the tenth hour of the same day, three Justices of the Bench, *s.* DYER, WESTON, and HARPER, WELSHE being absent on account of sickness, repaired to the place in their robes of scarlet, with the appurtenances and coifs; and the Serjeants

## 7. *Coke, Bacon, Selden*

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XVI. 29—FRANCIS BACON,  
BARON VERULAM



XVI. 30—JOHN SELDEN

puted in this land”; another epithet for him was “the great dictator of learning to the English nation”. His special field was the history of law, and his universal learning put him on an equal footing with the Continental jurists.

These English scholars did not borrow the Roman law wholesale, as the Americans have borrowed golf and its rules. Rather, they made over the English legal concepts so as to be cosmopolitan, much as Americans have used and adapted the classical European architectural forms in the skyscraping buildings invented by them-

## *XVI. Anglican Legal System*

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selves. In the neat metaphor of Professor Holdsworth, the great English legal historian of today, the Roman law learning "was received in small homeopathic doses, at different periods, as and when required; it has acted as a tonic to our native legal system, and not as a drug or poison".

8. Meanwhile, by the 1700's, English traders and English colonies had begun to dot the world in both hemispheres. English commerce had become cosmopolitan. The conditions were ripe for expansion of the law. William Murray Lord Mansfield,<sup>31</sup> and a few other judges, now carried onto the bench the spirit of Bacon and Selden, and made English commercial law cosmopolitan.

And at this propitious moment, Mansfield's protégé, William Blackstone,<sup>32</sup> first a professor, then a judge, was inspired to expound in lectures this Anglican system. On June 23, 1753, appeared the epoch-making announcement of Dr. Blackstone's course of lectures on the Laws of England.<sup>33</sup>

This was the first time that lectures on the English common law had ever been delivered at an English university. The book that came out of these lectures,<sup>34</sup> in 1765-1769, was unmatched for lucidity of style, outside of France; and it soon went around the world, in the colonies. So great was the appreciation in the American colonies







XVI. 31—WILLIAM MURRAY LORD MANSFIELD



XVI. 32—SIR WILLIAM BLACKSTONE

In Michaelmas Term next will begin

COURSE of LECTURES  
ON THE  
LAWS of ENGLAND.

By DR. BLACKSTONE, of *All-South* College.

THIS Course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Protection of the Common Law, but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Policy of their own Country.

To this End it is proposed to lay down a general and comprehensive Plan of the Laws of *England*; to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature, and of other Nations, without entering into practical Notices, or the minute Distinctions of particular Cases.

The Course will be completed in one Year; and, for greater Convenience, will be divided into four Parts, of which the first will begin to be read on *Tuesday* the 6th of *November*, and be continued three Times a Week throughout the Remainder of the Term. And the following Parts will be read in Order, one in each of the three succeeding Terms.

Such Gentlemen as propose to attend the Course, the Expenses of which will be six Guineas, are desired to give in their Names to the Reader some Time in the Month of *October*.

XVI. 33—ANNOUNCEMENT OF BLACKSTONE'S FIRST LECTURES

COMMENTARIES  
ON THE  
L A W S  
OF  
E N G L A N D.

BOOK THE FIRST.

BY  
WILLIAM BLACKSTONE, Esq.  
VINERIAN PROFESSOR OF LAW,  
AND  
SOLICITOR GENERAL TO HER MAJESTY.

O X F O R D,  
PRINTED AT THE CLARENDON PRESS.  
M. DCC. LXV.

XVI. 34—FIRST EDITION OF BLACKSTONE'S COMMENTARIES

[ 1097 ]



## *XVI. Anglican Legal System*

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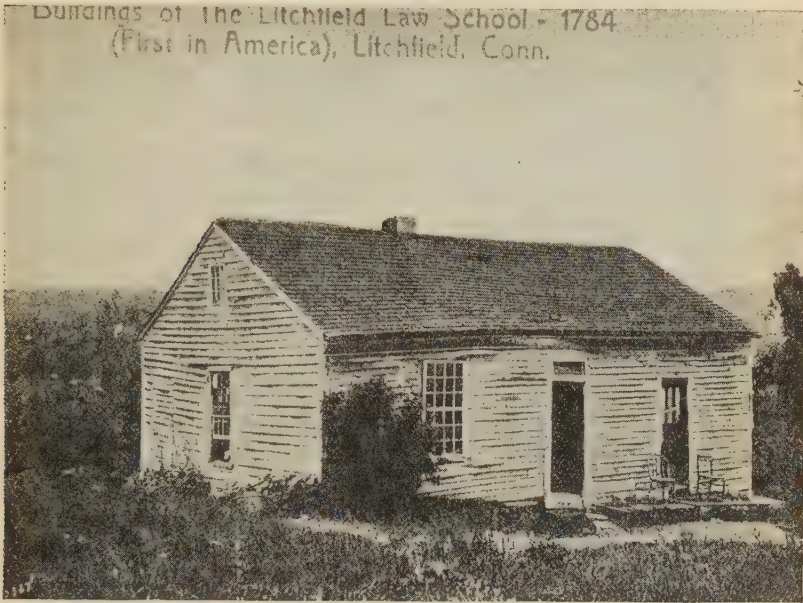
that one thousand copies of the first edition were imported in the first two or three years; for the first American reprint, in 1771, fourteen hundred subscriptions were taken before the edition was printed; and some twenty-five hundred copies in all were sold in the American colonies alone before the Declaration of Independence. The colonies were ripe to receive it. There were no Inns of Court, no organized means of acquiring a mastery of the law; the great period of American law schools had not yet arrived; even the humble school at Litchfield was not opened till after the date of political independence, about 1782.<sup>35</sup> Over two hundred colonial lawyers had gone across the ocean to the Inns of Court for their education during the 1700's; in Pennsylvania alone, four of these men became Chief Justices of the State, after independence; and several of them sat in the Constitutional Convention.

9. Thus, as the colonies grew into commonwealths, the Anglican system, following them, expanded and was adopted and adapted to their needs.

The earliest forecast of this transplantation of law is seen in the plans for the very first colonial settlement—Virginia, in 1606; the King's Instructions to the Virginia Council tell them that "the disposing of all causes happening within the same" should be "done as near to the com-



## 9. *Expansion*



XVI. 35—THE LITCHFIELD LAW SCHOOL, TODAY  
But its restoration is in progress

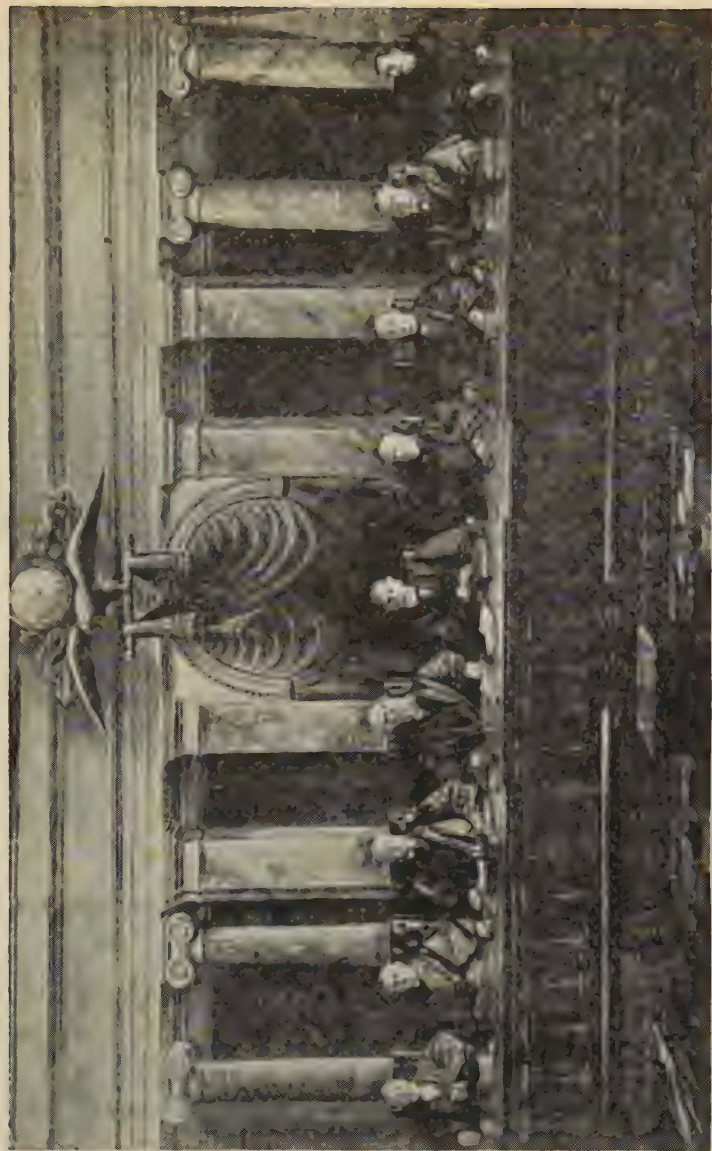
mon laws of England and the equity thereof as may be.” Then, a century later, in 1720, when the colonies had multiplied and were no longer an experiment, Mr. West, attorney-general to the Board of Trade, formulates a general principle, in a sonorous phrase of global augury: “The common law of England is the common law of the plantations . . . . Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.” Later, in 1763, when the Canadian regions came under English domain, the royal

## *XVI. Anglican Legal System*

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proclamation gives assurance that "all persons inhabiting in or resorting to our said Colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England." And on the very eve of the colonial revolution, in 1774, the Continental Congress, "asserting and vindicating their rights and liberties", deem it fitting to "declare that the respective colonies are entitled to the common law of England." Finally, in Australia, in 1828, the New South Wales Act (9 Geo. IV, c. 83) plants the principle in those far regions, by declaring that "all laws and statutes in force within the realm of England at the time of passing this Act . . . shall be applied in the administration of justice . . . so far as the same can be applied within the said colonies." The broad identical result is summed up, in 1853, by Mr. Justice Story: "Our ancestors brought with them the general principles of the common law, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition."

And so, after three centuries of expansion, at Washington<sup>36</sup> a Supreme Court now typifies the legal thought of fifty federated Supreme Courts developing a United States Anglican law. At Ottawa,<sup>37</sup> a Canadian Anglican law is now interpreted by the Supreme Court of other federated provinces. At Melbourne<sup>38</sup> an Australian



XVI. 36—SUPREME COURT AT WASHINGTON

## XVI. *Anglican Legal System*

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XVI. 37—THE CANADIAN PARLIAMENT BUILDINGS

Anglican law is now expounded for a federated commonwealth. And in a modest building in Downing Street, London,<sup>39</sup> a cosmopolitan tribunal, known as the Judicial Committee of the Privy Council, is the arbiter for a hundred different legislative and judicial bodies of the Anglican system, in dominions, colonies, and dependencies located in the four corners of the earth.

The mere list of names of the more or less distinct entities that compose or affiliate with that Commonwealth exhibits the imposing variety of peoples who fall within the sphere of influence—either political, legislative, or judicial—of the British Anglican system.<sup>4</sup>





XVI. 38.—SUPREME COURT BUILDING, MELBOURNE



XVI. 39.—OFFICE OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL



## *XVI. Anglican Legal System*

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### *EUROPE*

Scotland  
Northern Ireland  
Isle of Man  
Channel Islands  
    Jersey  
    Alderney  
    Guernsey  
Irish Free State  
Gibraltar  
Malta

Central Provinces and  
    Berar  
Coorg  
Delhi  
Madras Presidency  
Laccadive Islands  
North-West Frontier  
    Province  
Punjab  
United Provinces of Agra  
    and Oudh

### *Indian States and Agencies*

Assam State  
Baluchistan States  
Baroda  
Bengal States  
Bihar and Orissa States  
Bombay States  
Burma States  
Central India Agency  
Central Provinces States  
Gwalior  
Hyderabad  
Kashmir and Jammu  
Madras States  
Mysore  
North-West Frontier  
    Agencies  
Punjab States  
Rajputana  
Sikkim  
United Provinces States  
The Straits Settlements  
Cocos or Keeling Islands

### *ASIA*

Aden  
Bahrein Islands  
Borneo  
    British North Borneo  
    Brunei  
    Sarawak  
Ceylon  
    Maldiv Islands  
Hongkong  
India and Dependencies  
    British Provinces  
        Ajmer-Merwara  
    Andaman and Nicobar  
        Islands  
    Assam  
    Baluchistan  
    Bengal Presidency  
    Bihar and Orissa  
    Bombay Presidency  
    Burma

## 9. *Expansion*

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|                                       |                           |
|---------------------------------------|---------------------------|
| Christmas Island                      | West Africa               |
| Labuan                                | Nigeria                   |
| Federated Malay States                | Gambia                    |
| Malay States not in the<br>Federation | Gold Coast                |
| Wei-hai-wei                           | Ashanti                   |
| Mandated Territories                  | Northern Territories      |
| Iraq (Mesopotamia)                    | Sierra Leone              |
| Palestine                             | The Protectorate          |
| Trans-Jordan                          | Anglo-Egyptian Sudan      |
| <i>AFRICA</i>                         | Mandated Territories      |
| British East Africa                   | Tanganyika Territory      |
| Kenya Colony and pro-<br>tectorate    | South-West Africa         |
| Uganda Protectorate                   | Cameroons                 |
| Zanzibar                              | Togoland                  |
| Mauritius                             | <i>AMERICA</i>            |
| Nyasaland Protectorate                | Bermudas                  |
| St. Helena                            | Falkland Islands          |
| Ascension Island                      | Guiana, British           |
| Tristan da Cunha                      | Honduras, British         |
| Seychelles                            | <i>Canada</i>             |
| Somaliland Protectorate               | Alberta                   |
| South Africa                          | British Columbia          |
| Basutoland                            | Manitoba                  |
| Bechuanaland Protectorate             | New Brunswick             |
| Southern Rhodesia                     | Nova Scotia               |
| Northern Rhodesia                     | Ontario                   |
| Swaziland                             | Prince Edward Islands     |
| Union of South Africa                 | Quebec                    |
| Cape of Good Hope                     | Saskatchewan              |
| Natal-Zululand                        | Yukon                     |
| The Transvaal                         | North-West Territories    |
| Orange Free State                     | Newfoundland and Labrador |

## *XVI. Anglican Legal System*

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### *West Indies*

Bahamas  
Barbados  
Jamaica  
Cayman Islands  
Turks and Caicos Islands  
Leeward Islands  
Trinidad  
Windward Islands  
Grenada  
St. Vincent  
The Grenadines  
St. Lucia

### *AUSTRALASIA AND OCEANIA*

*Commonwealth of Australia*  
New South Wales

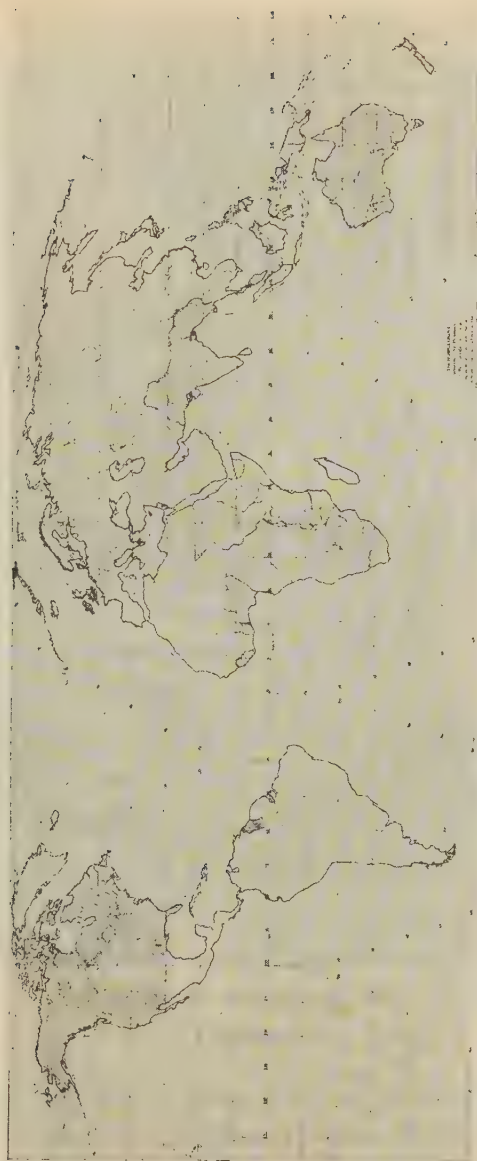
Victoria  
Queensland  
South Australia  
Western Australia  
Tasmania  
Northern Territory  
Papua  
New Zealand  
Fiji

### *Pacific Islands*

Tonga  
Other Islands  
Mandated Territories  
New Guinea  
Western Samoa  
Naru

Thus the Anglican system has belted the globe,<sup>40</sup> and has entitled itself to be classed as one of the three living world-systems,—that is, systems which have spread beyond the country and race of their origin. The other two are the Romanesque and the Mohammedan.

If we mark on the map in the Appendix the regions in which the respective systems not only hold exclusive sway but also have spheres of influence, marking other areas to show the regions in which the native systems have not expanded, the result may be thus stated: The total population of the earth is some 1800 millions; the Anglican



XVI. 40.—MAP OF THE ANGLICAN LEGAL SYSTEM

The areas in light shading represent spheres of influence; those in darker shading a complete system of laws.  
In the Appendix Map (pp. 1144, 1145, 1146) the boundaries and degrees of influence are shown with more accuracy than is here possible.

## *XVI. Anglican Legal System*

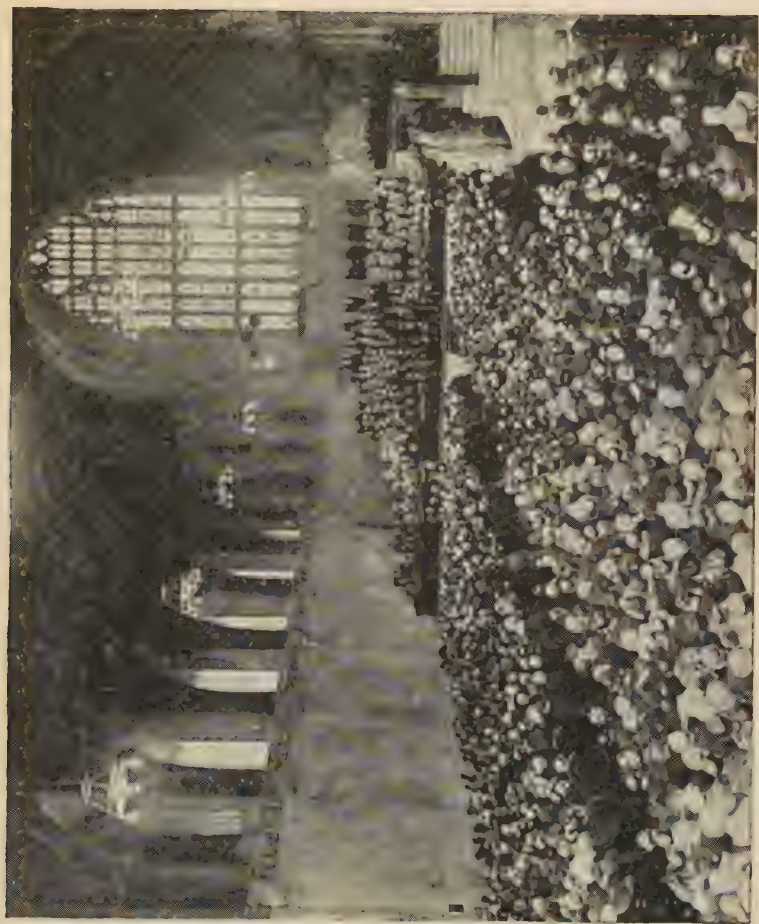
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system now shapes the legal relations of some 300 millions of persons; the Romanesque, of some 300 millions; and the Mohammedan, of some 250 millions; or between the three, about one-half of the world's population in all. All three systems have shown themselves strikingly adaptable, each in its own way, to its opportunities. Doubtless the most meritorious and adaptable will expand and survive the longest. And doubtless it depends largely on our profession to make our own system the most meritorious.

What the outcome of future centuries will be, none can attempt to predict. But, for the Anglican system, the most significant event of the present century was the visit of the American Bar Association to London in July, 1924, when lawyers of the Anglican system from the four corners of the earth assembled in Westminster Hall, in the oldest courtroom of Anglican law, where seven centuries bound them together in a common tradition and sentiment.<sup>42</sup> And, looking back on its history, it is possible to believe that the one most important thing that has enabled the Anglican legal system to survive and hold its own and expand has been its possession of a strong, fraternal, well-trained profession of the law.

And it seems fair to conclude, if we may generalize from this survey of the legal systems of many races, that





XVI. 42—THE AMERICAN BAR ASSOCIATION AT WESTMINSTER HALL, 1924

## *XVI. Anglican Legal System*

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the perpetuation of any legal system beyond the life of a particular political dynasty or of a particular race-stock can be guaranteed only by the development of a highly trained professional class.

But this thought leads to some other generalizations that concern the rise, progress, and disappearance of legal systems in general.

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2. *Domesday Book Chest.* From a photograph by *Clark*, Chiswick.
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5. *Trial of Warren Hastings.* From an old engraving in the Elbert H. Gary Library of Law.
6. *Archbishop Lanfranc.* From a photograph, taken for the author, of the statue on the façade of Canterbury Cathedral.
- 6a. *Abbey of Bea.* From a photograph by *N. D.*, Paris (No. 6076) obtained at Bec-Hellouin in 1932; the extensive grounds of the ancient Abbey are now used for a cavalry post.
7. *Bratton Court.* From a water-color sketch by *S. B. M.*, obtained in 1932 from *John F. Matthews*, photographer, Minehead.
8. *A Page from Bracton's DeLegibus.* From a photograph furnished by Prof. *G. E. Woodbine*, of Yale University, editor of the definitive text.
9. *Map of the Inns of Courts.* Prepared by the author from the plan in Karl Baedeker's "London" (1911).
10. *Inner Temple: The Library.* From the illustration by *Charles E. Flower*, published by *Raphael Tuck & Sons*, London.
11. *Chancellor's Court.* From an old lithograph by *Melville*, from a painting by *Shepherd*.
12. *King's Bench Walk.* See No. 10, above.
13. *Court of Common Pleas.* From an illustration reproducing an old MS., in *Serjeant Pulling*, "Order of the Coif", frontispiece (London, Clowes, 1884). There is another ancient view in "Archaeologia", vol. XXXIX.
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## XVI. *Anglican Legal System*

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18. *Littleton's Tenures*. From the edition of 1656.
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THE  
EVOLUTION  
OF  
LEGAL  
SYSTEMS

EPILOGUE



## XVII.

### *The Evolution of Legal Systems*

Legal systems as a whole, in contrast to specific legal ideas or institutions—General survey of the conception.

(I) *Comparative Law, in general*

(II) *Comparative Legal Institutions*

(III) *Comparative Legal Genealogy,  
or Corporealogy*

1. Corporeal method in comparative law.
2. Limited number of legal systems or bodies.
3. Problems peculiar to legal systems.
4. Causes of the creation, survival or disappearance of a legal system.
5. Existence of a trained professional class, as necessary to a legal system.





## Epilogue:

### The Evolution of Legal Systems



THESE impressionistic surveys of the sixteen legal systems in the world's history cannot fail to arouse in us some questions of broadest scope. What gives rise to a legal system? What controls its destiny? What becomes of the specific institutions—property, contract, testament—within each system? Are all of them inherent in every legal system? Do they evolve at equal pace as a part of the system? Have the specific institutions common elements in all systems? Does the evolution of a single legal institution—e. g. mortgage—take place uniformly by itself for all systems, i. e. in cross-section, as it were, apart from the evolution of any given system as a whole?

To these and similar questions no answer will here be attempted. But heretofore, in studies of legal history and evolution, no emphasis has been given to the existence and growth of the world's systems as wholes—the subject of the foregoing surveys. And it is worth while to show here, in closing, the importance of this conception, as necessary before any final analysis of the evolution of specific legal ideas or institutions.

## *XVII. Evolution of Legal Systems*

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And so (for those who care) the following broader survey of the whole field of the problem, in outline, is here offered.

(I) *Comparative Law, in General.* (1) The convenient but loose term "Comparative Law" has served to cover three fields scientifically distinct. When we lift our eyes beyond the sphere of the law that *is* (emphatically the only actual law for us, i. e. national law), and observe the systems of laws outside, present or past, we find three modes of activity for our thought of them.

First, we may seek to ascertain and *describe* the other systems, as facts. And, taking the term Nomology to signify the science of law in general, and Nomoscopy to signify the description of the facts of any system of law, let us call this branch Comparative Nomoscopy.

Secondly, we may seek to *analyze the policies* and relative *merits* of different legal institutions (e. g. the French and the English inheritance-rules, or the American and the English procedural rules) with a view to moulding legislation; let us call this branch Comparative Nomothetics; this is the main activity, e. g. of the Institute of Comparative Law at Lyon.

Thirdly, we may seek to trace the *evolution* of the various systems in their relation one to another in chron-

## (I) *Comparative Law*

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ology and causes; let us call this branch Comparative Nomogenetics.

These three branches may use, to some extent, the same materials; and of course the first branch—Comparative Nomoscopy—is the one that furnishes most of the materials for all three. But the three represent different processes of thought, and are scientifically distinct.

The third branch, Comparative Nomogenetics—the evolution of the world's legal ideas and systems—is the one here concerned.

(II) *Comparative Legal Institutions*. Sir Henry Maine was virtually the first modern scholar to undertake to cultivate Comparative Law in general. Post, coming a little later, also advanced it, in other parts of the field. In the next generation, Dareste, Revillout, Kohler, and others, copiously enriched it. But these, and indeed most of the modern workers, have kept chiefly in the field of what is called above Nomoscopy; i. e. they have *described* other systems or institutions, but have not undertaken to trace their evolution, or *genetics*, comparatively. Sir Henry Maine's works, however, were almost all genuinely nomogenetic, though in the limited scope of four or five systems (Hindu, Greek, Roman, Keltic). As an example of an attempt to treat a single institution on a broader

## *XVII. Evolution of Legal Systems*

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scope of evolutionary comparison (ten systems) may be cited the present writer's essay on "The Pledge-Idea; a Study in Comparative Legal Ideas".<sup>1</sup> And the necessary conditions (never yet fulfilled by any scholar) on which complete studies must be based have been suggested by the present writer in his essay on "Problems of the Law's Evolution."<sup>2</sup>

Naturally, in Sir Henry Maine's day, the extant materials for study of other systems were limited. But within the last generation the realms of archaeology, epigraphy, papyrology, philology, "et id omne genus", have vastly enlarged; so that today there remain virtually no civilizations unrevealed in available materials for study. Nor is it likely (except for the Hittite and possibly the early American peoples) that any more legal systems will be brought to light.

(III) *Comparative Legal Genealogy, or Corporealogy*. And this brings us to the next point; which is that hitherto there has been little or no consideration given to all these systems as *whole systems*, from the comparative point of view. Virtually all of the students (of course, Mazzarella, and one or two others, are exceptions) of these other systems, viewed comparatively, offer studies

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<sup>1</sup> Harvard Law Review, vol. X, pp. 321, 389, vol. XI, p. 18 (1897).

<sup>2</sup> "Problems of Law, Its Past, Present and Future" (University of Virginia Lectures, New York, Scribner 1920).

### (III) *Comparative Legal Corporealogy*

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of *specific institutions* or ideas; e. g. of marriage, inheritance, procedure, and so on.

(1) Now, the tracing of the evolution of specific rules and institutions is of course the ultimate aim, in comparative nomogenetics. But this objective needs, for its completion, an auxiliary study of the systems as such, taking each as a whole. Since the individual rules and institutions are bound and related together, as the gross product of the social and political life of a particular race or people, their evolution cannot be fully understood without first conceiving the whole system, in its political environment and its chronology. E. g. a biologist might make a comparative study of the liver of an African, a Chinese, a Russian, and an Italian; but he could not expect to reach safe conclusions on the liver as a human organ unless he had already studied the complete body in the environment of each of these races, as a composite entity of several other organs in a special origin and environment.

Let us call this mode of treatment the Corporeal method in comparative law. Professor Hozumi, the eminent Japanese jurist, called it the Genealogical method, i. e. "a method which takes for the unit of comparison a certain group of laws having a common lineage or descent".<sup>3</sup> Whether the analogy of a physical body,

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<sup>3</sup> N. Hozumi, "The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence", p. 33 (Tokyo, Maruzen, 2d ed. 1912).



## *XVII. Evolution of Legal Systems*

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rather than of a social family, is the closer, is open to argument. But the term here chosen is Corporeal.

The analogy of language is perhaps the nearest. Speech, like law, is a human and social behavior-product. As the dialects are numbered by thousands, the languages by hundreds, but the families of language by scores only; so the congeries of local customs are numerable by thousands, the groups of national or tribal law by the hundred, but the systems of law by not more than a score. Language-families originate territorially in a dominant race-stock; so do law-systems. Languages may be transferred from the native race-stock to alien race-stocks; so may legal systems. And the study of languages has been vitally assisted by the discovery and historical analysis of language-families. The study of etymological elements, i. e. of particular word-roots and of parts of speech, by taking (as it were) a cross-section of languages in comparison, is one thing, and corresponds to the study of a particular institution, such as contract or mortgage, in different legal systems. But the study of the growth and transformation of a language-family, as a whole, and as the common possession of various peoples having a territory and a history, is a different thing,—the Indo-European family, for example, in Asia and Europe, the Semitic family in Asia and Africa, and the Edo family in

### (III) Comparative Legal Corporealogy

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Africa. This corresponds to the study of a legal system, as a corporeal entity, having an external history in time and place, apart from its specific internal institutions. It is this corporeal method in comparative nomogenetics to which we here call attention.

(2) Now, this study of each legal system as a whole was not feasible until very modern times. Nor would it be attractive, in the highest degree, as a basis for broad and safe generalizations, unless we believed that we had before us *virtually all the actual systems*.

The present writer believes that such is now the case. There are, or have been, no more than sixteen or so legal systems in the world. They are these: Egyptian, Mesopotamian, Hebrew, Chinese, Hindu, Greek, Roman, Maritime, Japanese, Mohammedan, Keltic, Germanic, Slavic, Ecclesiastical, Romanesque, Anglican.<sup>1</sup>

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<sup>1</sup>The *Inca* system of law in Peru has not been here considered, for three reasons: (1) the Incas had no system of writing for records (only knotted strings), and hence their law left no records of its own; (2) our knowledge of it comes through the chronicles of their Spanish conquerors, not fully dependable for this purpose; (3) the extant accounts are too scanty for reconstructing the system. The following works include the principal extant materials in English: *Clements R. Markham*, ed., "Narratives of the Rites and Laws of the Yncas" (Hakluyt Soc'y, London, 1873); *F. Montesinos*, transl. *Philip A. Means*, "Memorias Antiguas Historiales del Peru" (Hakluyt Soc'y, London, 1920); *Philip A. Means*, "Ancient Civilizations of the Andes" (New York, 1931; with bibliography); "Indian Legislation in Peru" (Hispanic-American Historical Rev., Durham, N. C., 1921); *Paul Minnaert*, "Les institutions et le droit de l'Empire des Incas" (Paris, 1923); *Hermann Trimborn*, "Familien und Erbrecht im prä-kolumbischen Peru" (Zeitschrift f. vergleichende Rechtswissenschaft, 1927, XLI, 353).

As to *Mexico* and the *Aztec* system, see the following: *A. F. Bandelier*, "Distribution and Tenure of Lands and the customs with respect to Inheritance among the ancient Mexicans" (Peabody Museum Reports, 1881, vol. II, p. 385); "Social Organization and Mode of Government of the ancient Mexicans" (ibid. 1882, vol. II, p. 557); *Herbert M. Wintzer*, "Das Recht Alt-Mexikos" (Zeitschrift fuer vergleichende Rechtswissenschaft, 1930, XLV, 321-480; a comprehensive reconstruction, based on all the sources). The various data have been assembled and summarized by *Rupert Stephens*, Jr. (MS. 1933, Northwestern University School of Law).

## XVII. Evolution of Legal Systems

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Of the *Mayan* people's customary law, something substantial has been discovered by recent archaeological research; the principal data are to be found in *Thos. Gann* and *Eric J. Thompson*, "The History of the Maya" (New York, 1931); *Eric J. Thompson*, "The Civilization of the Mayas" (Field Museum, Anthropology Leaflet No. 25); *T. A. Joyce*, "Mexican Archaeology" (New York, 1914); *Philip A. Means*, "History of Yucatan and the Itzas" (Peabody Museum Pub. vol. VII).

The *Hungarian* law does not present a new type of system. Though the Hungarian race-stock is Altaic or Turanian, and hence distinct from its neighboring Slavic and Germanic stocks, yet it had not reduced to writing nor developed a legal system in the primitive stage of its arrival in Europe; and its germs were early cultivated in a Romanesque culture (e. g. its legal annals were preserved in Latin from A. D. 1200 for some six centuries); so that it never developed a system of its own.

Whether the *Ethiopian* stock had originally a civilization of its own does not yet appear to be settled. But it very early fell under the influence of the Christianized Roman law-books of Byzantium, and its legal system (such as it is) belongs under the Romanesque type; see the works cited *ante*, Chap. IX.

The *Hittite* law, so far as the deciphered records yet show, can not be regarded as distinct from the Mesopotamian system.

The *Mongolian* tribes, as early as A. D. 1200, had begun independently to reduce their customary law to writing; but it was already under the influence of the Buddhist system; see the works cited *ante*, Chap. V, Note under "General References."

The peoples of the larger *East Indian Islands* (Malay stock) must have been on the way to develop a legal system. But before the use of writing arrived, they were overrun by immigrant Hindu Buddhists, and later by Mohammedan Arabs, each bringing a written system. Hence the development of indigenous ideas was arrested. In *Madagascar*, however, the Malay stock arrived probably in the 7th century, before being affected by either Buddhist or Mohammedan influence. It is possible that the Madagascan people, who continued under a stable native government unaffected by foreign conquest until the 19th century, may be deemed the only Malay people who developed a pure and distinctive legal system. Consult the following works: *Albert Cahuzac*, "Essai sur les institutions et le droit Malgache" (Paris, 1900); *Arnold van Gennep*, "Tabou et Totemisme à Madagascar" (Paris, 1904); *Laurant Crémazy*, "Notes sur Madagascar" (5 parts, Paris, 1883-1888); reprint from "Revue maritime et coloniale").



## *XVII. Evolution of Legal Systems*

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Of course, every human race and community has had its particular customs of some sort. But just as the biologists draw the great line between invertebrates and vertebrates, and again between animals and humans, so the legal scientist must recognize and set apart the higher forms of socio-legal phenomena, viz. those which represent a body of rules consciously connected and developed as a whole. A legal system is a body of rules having a life of its own, as a part of some political system. Such legal systems react upon themselves, and tend by logic to develop individual details—just as the specific organs of the vertebrate mammal plantigrade homo are modified in details by the subjective process of cerebration, independently of environment. Hence they form a class by themselves for the legal scientist.

(3) Moreover, taking this corporeal life of the whole legal system, we find that it presents some problems of evolution of its own, irrespective of the evolution of particular legal institutions within it. The legal systems are usually found associated, in their beginnings, with a certain race or community having political life. In the course of that life, whole legal systems are seen to disappear or to survive, while the racial, or social, or political life goes on or does not go on. And so, certain questions



### (III) *Comparative Legal Corporealogy*

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peculiar to the evolution of systems force themselves on us. Here are four, at least, for example:

(i) Whether a legal system is a mere occasional by-product of racial social-political life, or is rather an essential *function*?

(ii) Whether occasional or essential, does it come into being by *imitation* of another people (the theory of Tarde, the eminent sociologist) or by inherent psychological necessity (the theory of Del Vecchio, the eminent philosopher)?

(iii) If an essential function, whether a legal system is, in its location, *generic* to all organized humanity, or is only sub-human, i. e. found in certain *species* that are racial or national?

(iv) If racial or national, then, when the race or nation *disappears*, does the legal system disappear? Or, if not (sometimes or often), what is the place and process of its survival; and what the explanation of the anomaly?

(4) To illustrate the possibilities of these questions, as forced upon us by the comparative study of all the systems as wholes, let the following facts be considered, with these tentative generalizations:

Of the world's sixteen systems (as diagnosed by the present writer): (a) Six have disappeared completely (*as*

## *XVII. Evolution of Legal Systems*

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legal systems), viz. Egyptian, Mesopotamian, Greek, Hebrew, Keltic, Canon; (b) Five survive as hybrids, viz. Roman, Germanic, Slavic, Maritime, Japanese; (c) Three survive more or less unmixed, viz. Chinese, Hindu, Mohammedan; (d) Two are new-created as hybrids, viz. Romanesque, Anglican.

Now it will be noted, of the six that have disappeared, that their governments or nations also have disappeared, but that their native race-stocks have not all disappeared, e. g. Egyptians and Hebrews. "A legal system, then, may die, without the *race-stock* dying"; is this a sound generalization?

Again: Of the five that survive as hybrids, they are in two instances no longer associated with race-stocks (Roman, Maritime). "A legal system, then, may partly survive, irrespective of the *race-stock*"; is this a sound generalization?

Again: Of the three that survive unmixed, the race-stock survives in all, but in two instances (Hindu, Mohammedan) not the government. "A legal system, then, may survive without the *political system* surviving"; is this a sound generalization?

Again, if we examine the six systems that have disappeared and the three that have survived unmixed, we find that in three of the first six (Egyptian, Mesopotamian,

### (III) *Comparative Legal Corporealogy*

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Keltic) the *professional class* that administered the law disappeared at the same time; that in the two where the professional class has not disappeared (Hebrew, Canon) the system itself survives but not as law; and that in the sixth (Greek) there never was (in strictness) any professional class. And we find that of the three that survive unmixed, the professional class survived in all (Chinese, Hindu, Mohammedan) in spite of political changes. Moreover, in the two newly created (Romanesque, Anglican), a professional class was the instrument of their creation.

(5) This leads to a generalization (which has become a favorite hypothesis of the present writer's): The principal feature that controls the creation or the survival of a legal system is the rise and persistence of a body of technical legal ideas; and this body of legal ideas is itself the result of the existence of a professional class of legal thinkers or practitioners, who created and preserved the body of ideas independently of the identity of the political system and independently of the purity of the race-stock. In short, *the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class.*

The foregoing generalizations are, of course, merely hypotheses thrown out as worthy of inquiry. But they

## *XVII. Evolution of Legal Systems*

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serve to illustrate the scientific importance of studying each of the several legal systems in its corporeal whole, as a preliminary to the study of the evolution of specific legal ideas or institutions.<sup>1</sup>

The present work, it is hoped, may help to interest many students in this point of view, and thus to place on a broader basis the science of Comparative Legal History.

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<sup>1</sup>For sundry more detailed suggestions of problems of legal evolution in the several systems, see the present writer's article, "Jottings on Comparative Legal Ideas and Institutions" (Tulane L. Rev., 1931-32, VI, 48, 244).

# Appendix





# Appendix

## A WORLD-MAP OF PRESENT-DAY LEGAL SYSTEMS

Since the world's legal systems can be identified in area, and are limited in number, the study of them would be assisted by a map showing the areas of the world's surface covered by the respective systems. Changes at successive periods could and should be shown by a series of period-maps (as is done for the history of national and dynastic boundaries). But here, for a first attempt, will be offered only a map of the present-day period.<sup>1</sup>

For reading the map, some explanations must be made as to: A, Classification of Systems; B, Symbols used; C, Ascription of Systems to particular nations or areas.

### A. CLASSIFICATION OF SYSTEMS

Only *systems* can be separately shown, i. e. the few developed bodies of law, not the innumerable unorganized groups of tribal custom.

But all systems now in existence are more or less *mixed* in origin and history, and the various shades of these mixtures are too numerous to be represented. Hence only the

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<sup>1</sup>This map owes its origin to a suggestion of Col. Lawrence Martin, chief of the map-division of the Library of Congress, following a conference with M. Pierre LePaulle of the Paris Bar, and others, at the Williams College Institute of Politics, in the summer of 1927.

For the large original, in a single sheet, with colors, see the (American) Geographic Review, vol. XIX, p. 114 (January, 1929) "A Map of the World's Law".

## Appendix

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system representing the *present dominant character* or characters of the law in a given nation or area can be shown.

Nevertheless, some mixtures cannot be ignored. In certain areas, to show a single unmixed system would be misleading, and would be valueless for the purpose of analyzing tendencies. Therefore at least four distinctions in types of mixtures, seem necessary, as well as feasible, to represent on the map. These four types are as follows:

(1) *Pure Systems*; i. e. as in England, France.

(2) *National Blends*, i. e. where a people having a native system has adopted in part an alien system (by recasting its native system in alien categories, or otherwise), thus making a single blended system under native sovereignty; as in Japan.

(3) *Colonial Composites*, i. e. where an alien power, holding a colony or protectorate or mandate, has imposed its own political or public law, but continues to preserve and enforce the native system for private law, in part or in whole; as in Algeria.

(4) *Colonial Duplex Composites*, i. e. where an alien power has done as in (3), but enforces two or more native systems for separate classes of natives; India is the only notable example of this.

## *World-Map of Legal Systems*

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*Extra-territoriality* is not here shown, i. e. where a native sovereignty enforces foreign law for the alien residents as a separate class of persons, either in consular courts or in mixed courts; this form of jurisdiction does not add to the types of systems, though it may affect numbers of the population.

On the above four types, the following further comments must be made:

(1) *Pure Systems*. Of the sixteen systems described in the foregoing chapters, only eight can be recognized surviving as such in today's world, viz. Anglican, Chinese, Germanic, Hindu, Japanese, Mohammedan, Romanesque, Slavic.

Of these eight, only four are now found anywhere as pure systems, viz. Anglican, Hindu, Mohammedan, Romanesque; the remaining ones appear only in blends or composites.

(2) *Blends*. The distinction between a blend and a composite is this: In a blend, various institutions from two systems are fused into a single system, under native sovereignty, *applicable to all persons* in the jurisdiction (except extra-territorial exemptions); but in a composite, the two systems remain separate, each being applicable to a *different group of persons*. Thus there might conceivably

## Appendix

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be a *national* composite (and there is, in fact, in Egypt, and elsewhere, and was in imperial Russia, though for groups of persons too small to be here recognized). But on this map the blends are only national, i. e. under native sovereignty, and the composites are only colonial, i. e. under alien sovereignty.

One particular blend calls for special note, viz. the Russian Soviet Federation. Here the foundation is still more or less the historical Romanized Slavic blend, nominally displaced by the Communist system; but the Communist institutions are formulated in Romanesque categories, and at the present time it seems best to class the system as a blend, not a new independent system.

Blends, of course, differ in the *degree of actual application* of the borrowed system as law. E. g. in Japan and Siam the blend has long been thorough; in China it has made substantial start; in Turkey, it is as yet beginning; in Persia it is in embryo. No attempt to show such differences is made on this map.

Blends also differ in the various *parts chosen* from the two systems for blending. E. g. in Scotland and in the South African Republic the elements taken from the Romanesque system would be very different from the Romanesque elements taken by Japan, by China, by



## *World-Map of Legal Systems*

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Persia, by Siam. No attempt to show such differences is made on this map.

Blends are of course open to difference of opinion in respect to the *quality* of a blended element that entitles it to recognition for particular nations. For example, Scotland and the South African Republic are commonly classed under the Romanesque system; yet the Anglican element is too large to be ignored; and therefore both those countries are shown on the map as blends. The Scandinavian countries are also commonly classed as Romanesque; yet the Germanic system (obsolete everywhere in its pure form) is there so largely preserved that it cannot justly be ignored, and all of those countries are therefore shown as blends. For these and other countries, the map has chosen solutions which are no doubt open to difference of opinion.

(3) (4) *Composites*. In a composite system, the *number of native* systems (i. e. of "personal" law) that might be actually enforced by an alien sovereignty is of course theoretically large. In some countries, no doubt, it is at least plural. But only the *one* major native system is recognized on this map; i. e. the one in force among the large mass of the population. The only composite country for which two native systems are shown on the map is

## Appendix

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India, where Hindu law and Mohammedan law must both be recognized.

Where no organized system is found, but only *local tribal customs*, this infinitely variegated type is represented on the map by a single symbol. It always appears as a composite, of course, because the whole terrestrial surface is now nominally under the sovereignty of one or another national power, and thus the areas in which local tribal custom still obtains are usually under one or another alien power, either as colonies, protectorates, or mandates.—Local tribal custom is of course recognized, or actually in force, in many areas of Asia and of Africa too small to be recognized on the map. Some of them, moreover, are in strictness national composites, not colonial composites.

In the lesser known or more recently dominated areas of Africa and Asia, there are many *border-line regions* where the allotment of systems must of course be tentative only. E. g. in Africa, the region of Mohammedan law (as a composite element) shades off gradually into the region of tribal custom. So, too, in northwestern and north central Asia, the areas of tribal custom, as contrasted with the surrounding Chinese, Hindu, Mohammedan, and Soviet systems, leave many doubtful border-lines. The map here attempts to show no more than broad tendencies.

## *World-Map of Legal Systems*

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As to the *kind of law* (public law, etc.) that is imposed by the alien political power in colonial composite systems, this differs, of course, under different powers. Alien taxation-law and police-law are always found; also more or less penal law, and often judiciary organization. Civil procedure is sometimes included (India), sometimes not (Morocco). No attempt is made to represent these variations on the map.

### B. SYMBOLS

For readiest apprehension, different colors should be used to indicate the several systems.<sup>1</sup> But on this black-and-white map the systems can be adequately shown by the use of *letters*, capital and small, alone and in combination. Thus:

A capital letter alone represents a *pure* system. Two capital letters represent a *blend*. A capital letter and a small letter represent a *composite*.

The letters chosen are the initial letters of the names used above for the systems. The several systems are lettered as follows:

#### *Key to Letter Symbols*

|                   |                         |
|-------------------|-------------------------|
| A—Anglican System | M—Mohammedan System     |
| C—Chinese System  | R—Romanesque System     |
| G—Germanic System | S—Slavic System         |
| H—Hindu System    | SS—Soviet Slavic System |
| J—Japanese System | T—Tribal Customary Law  |

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<sup>1</sup> For the single-sheet map in colors, see the citation *ante*, p. 1133.

## *Appendix*

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Blends are lettered thus: AR (Anglican-Romanesque), RC (Romanesque-Chinese).

Composites are lettered thus: Am (Anglican-Mohammedan); Rt (Romanesque-Tribal custom).

*Countries* (nations, colonies, protectorates, etc.) are indicated by numerical figures. The terrestrial surface is divided into four continents (Africa, America, Asia, Europe) and Oceanica. Within each division the several countries, etc., after being arranged alphabetically, are numbered serially, and this number is placed also on the map at the proper location. Countries and possessions not large enough for map-marks, or not important enough for distinction from adjacent areas, have been ignored.

National boundaries have not been marked by the author; the marks would have confused a map of this size. But on the original Goode map-plate the boundaries are marked, as of 1923, by dotted lines, which can be discerned on this map with the aid of a hand-lens.

### C. ASCRIPTION OF SYSTEMS TO PARTICULAR REGIONS

There is of course some room for difference of opinion in the ascription of systems to particular regions, even of those systems that have long been well known. For regions not yet fully described in authentic legal chronicles, there is even more room for controversy by those who have special knowledge of particular areas. The following

## *World-Map of Legal Systems*

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allotment represents the author's opinion (tentative in many instances) formed in the light of available information:

| AFRICA        |                        |               | AMERICA       |                       |               |
|---------------|------------------------|---------------|---------------|-----------------------|---------------|
| <i>No. on</i> |                        |               | <i>No. on</i> |                       |               |
| <i>Map</i>    | <i>Name</i>            | <i>System</i> | <i>Map</i>    | <i>Name</i>           | <i>System</i> |
| 1.            | Abyssinia.....         | RT            | 1.            | Argentina.....        | R             |
| 2.            | Algeria.....           | Rm            | 2.            | Bolivia.....          | R             |
| 3.            | British S. W. Africa.. | At            | 3.            | Brazil.....           | R             |
| 4.            | Congo (Belg.).....     | Rt            | 4.            | Canada.....           | A             |
| 5.            | Congo (Fr.).....       | Rt            | 5.            | Canal Zone.....       | AR            |
| 6.            | Egypt.....             | M             | 6.            | Cent. Am. States..... | R             |
| 7.            | Eretria.....           | Rm            | 7.            | Chile.....            | R             |
| 8.            | Gold Coast.....        | Am            | 8.            | Columbia.....         | R             |
| 9.            | Liberia.....           | At            | 9.            | Cuba.....             | R             |
| 10.           | Libia.....             | Rm            | 10.           | Ecuador.....          | R             |
| 11.           | Madagascar.....        | Rt            | 11.           | Guiana (Br.).....     | A             |
| 12.           | Morocco.....           | Rm            | 12.           | Guiana (D.).....      | R             |
| 13.           | Nigeria (Br.).....     | Am            | 13.           | Guiana (Fr.).....     | R             |
| 14.           | Nigeria, etc. (Fr.)... | Rm            | 14.           | Honduras (Br.).....   | A             |
| 15.           | Port. E. Afr.....      | Rt            | 15.           | Louisiana.....        | AR            |
| 16.           | Port. W. Afr.....      | Rt            | 16.           | Mexico.....           | R             |
| 17.           | Rhodesia, Bechuana-    |               | 17.           | Paraguay.....         | R             |
|               | land, etc.....         | At            | 18.           | Peru.....             | R             |
| 18.           | Sierra Leone.....      | Am            | 19.           | Puerto Rico.....      | AR            |
| 19.           | Somali (Br.).....      | Am            | 20.           | Quebec.....           | AR            |
| 20.           | Somali (Ital.).....    | Rm            | 21.           | Uruguay.....          | R             |
| 21.           | So. Afr. Rep.....      | AR            | 22.           | U. S. America.....    | A             |
| 22.           | Sudan.....             | Am            | 23.           | Venezuela.....        | R             |
| 23.           | Tanganyika.....        | Atm           | 24.           | West Ind. Islands     |               |
| 24.           | Tripoli.....           | Rm            |               | (Br.).....            | A             |
| 25.           | Tunisia.....           | Rm            | 25.           | West Ind. Islands     |               |
| 26.           | Uganda and Kenya..     | Am            |               | (Fr.).....            | R             |



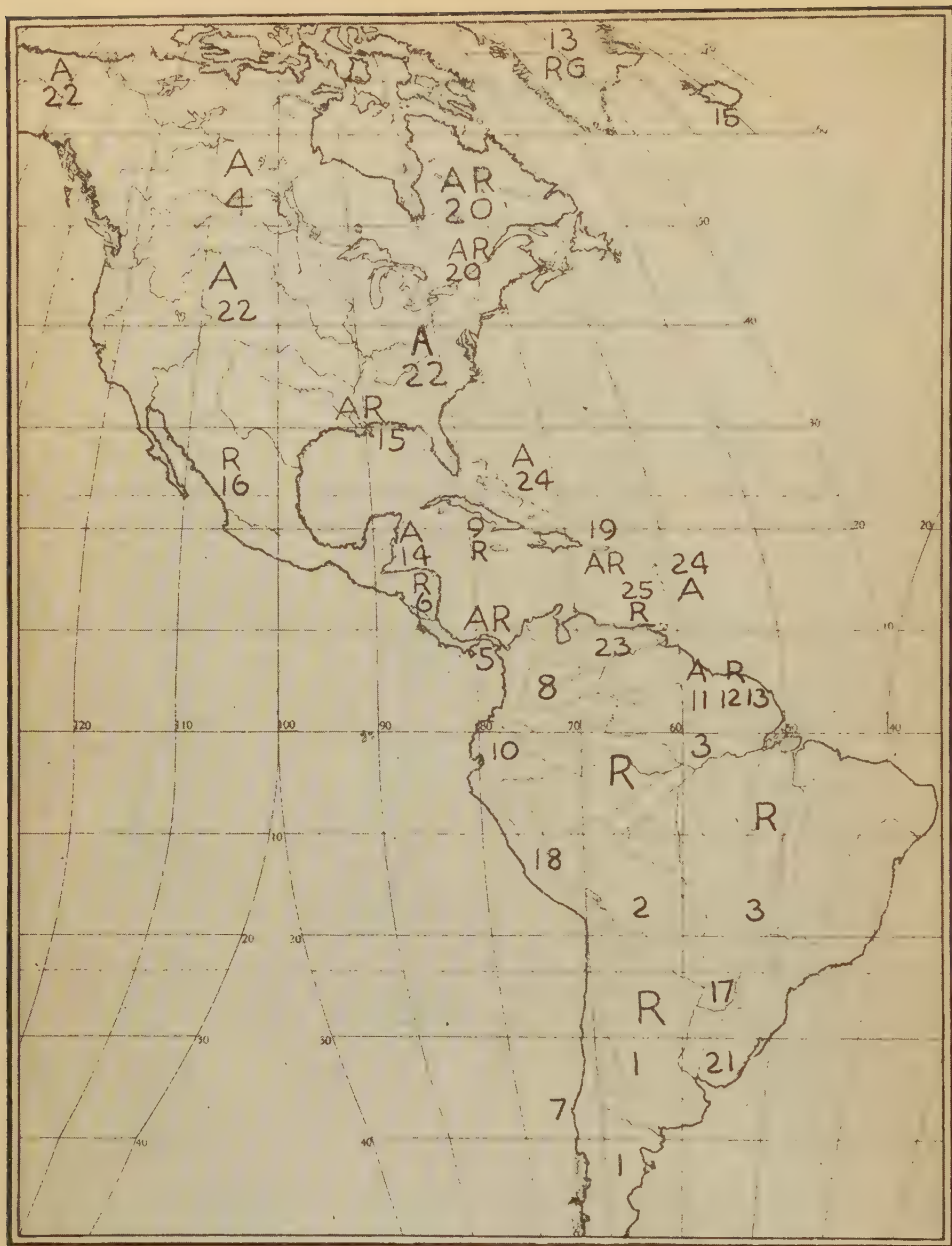
## *Appendix*

| ASIA                  |                             |               | EUROPE                |                      |               |
|-----------------------|-----------------------------|---------------|-----------------------|----------------------|---------------|
| <i>No. on<br/>Map</i> | <i>Name</i>                 | <i>System</i> | <i>No. on<br/>Map</i> | <i>Name</i>          | <i>System</i> |
| 1.                    | Afghanistan.....            | M             | 1.                    | Albania.....         | RS            |
| 2.                    | Annam.....                  | Rc            | 2.                    | Austria.....         | R             |
| 3.                    | Arabia (remainder)...       | M             | 3.                    | Belgium.....         | R             |
| 4.                    | Beluchistan.....            | Am            | 4.                    | Bulgaria.....        | RS            |
| 5.                    | Bokhara.....                | M             | 5.                    | Czechoslovakia.....  | RS            |
| 6.                    | Burma.....                  | Ah            | 6.                    | Denmark.....         | RG            |
| 7.                    | Cambodia.....               | Rh            | 7.                    | England & Wales..... | A             |
| 8.                    | China.....                  | RC            | 8.                    | Esthonia.....        | RG            |
| 9.                    | East Ind. Isl. (Br.)        | Am            | 9.                    | Finland.....         | RG            |
| 10.                   | East Ind. Isl. (D.)         | Rm            | 10.                   | France.....          | R             |
| 11.                   | Hejaz.....                  | M             | 11.                   | Germany.....         | R             |
| 12.                   | India.....                  | Amh           | 12.                   | Greece.....          | R             |
| 13.                   | Irak.....                   | M             | 13.                   | Greenland.....       | RG            |
| 14.                   | Japan.....                  | RJ            | 14.                   | Hungary.....         | R             |
| 15.                   | Korea.....                  | RJ            | 15.                   | Iceland.....         | RG            |
| 16.                   | Manchuria.....              | RC            | 16.                   | Ireland.....         | A             |
| 17.1                  | Mongolia (Inner) ..         | RCh           | 17.                   | Italy.....           | R             |
| 17.2                  | Mongolia (Outer)            | RSSh          | 18.                   | Latvia.....          | RG            |
| 18.                   | Palestine.....              | Am            | 19.                   | Lithuania.....       | RS            |
| 19.                   | Persia.....                 | RM            | 20.                   | Netherlands.....     | R             |
| 20.                   | Phil. Isl.....              | AR            | 21.                   | Norway.....          | RG            |
| 21.                   | Siam.....                   | RH            | 22.                   | Poland.....          | RS            |
| 22.                   | Siberia.....                | RSS           | 23.                   | Portugal.....        | R             |
| 23.                   | Syria.....                  | Rm            | 24.                   | Rumania.....         | RS            |
| 24.                   | Tibet.....                  | H             | 25.                   | Russia.....          | RSS           |
| 25.                   | Tonkin.....                 | Rc            | 26.                   | Scotland.....        | AR            |
| 26.1                  | Turkestan (Russian) ..      | M             | 27.                   | Spain.....           | R             |
| 26.2                  | Turkestan<br>(Chinese)..... | RCm           | 28.                   | Sweden.....          | RG            |
| 27.                   | Turkish Rep.....            | RM            | 29.                   | Switzerland.....     | R             |
|                       |                             |               | 30.                   | Yugoslavia.....      | RS            |

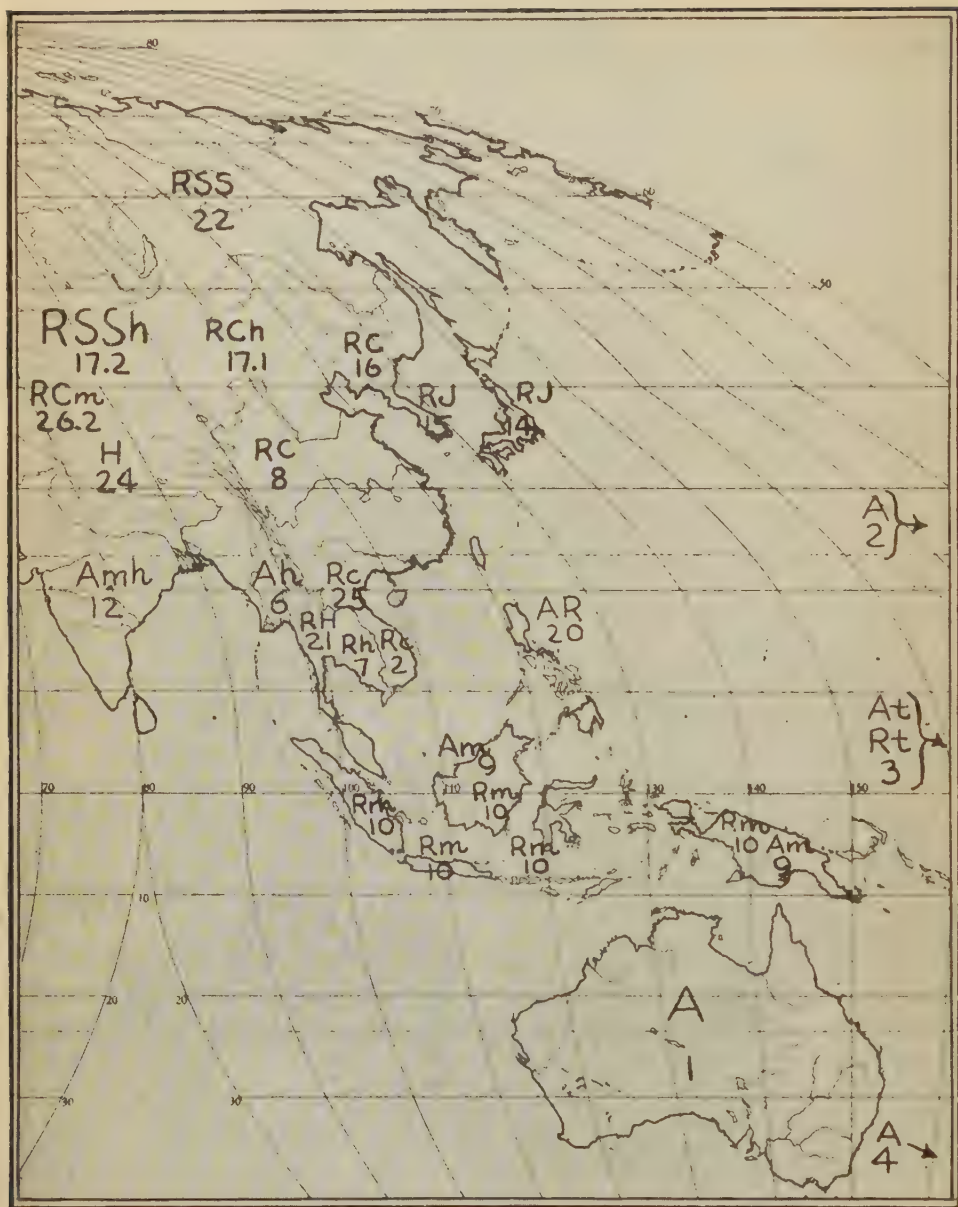
## *World-Map of Legal Systems*

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| OCEANICA      |                       |               | <i>No. on</i> |                         |               |
|---------------|-----------------------|---------------|---------------|-------------------------|---------------|
| <i>No. on</i> |                       |               | <i>Map</i>    | <i>Name</i>             | <i>System</i> |
| <i>Map</i>    | <i>Name</i>           | <i>System</i> |               |                         |               |
| 1.            | Australia . . . . .   | A             | 3.            | { Melanesia } . . . . . | { At          |
|               |                       |               |               | { Micronesia }          | { Rt          |
| 2.            | Hawaiian Isl. . . . . | A             | 4.            | New Zealand . . . . .   | A             |







SHEET 3: WORLD-MAP OF PRESENT-DAY LEGAL SYSTEMS  
(Key on p. 1139. Pacific Islands are indicated at the right)



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